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No. _____

Office-Supreme Court, U.S.
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JUL 15 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1983

DONALD GOLDBERG,

Petitioner,

v.

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually, and doing business as WOODCREST NURSING HOME,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

H. STUART KLOPPER
Counsel for Petitioner
170 Old Country Road
Mineola, New York 11501
(516) 747-0900

Dated: July 15, 1983

QUESTIONS PRESENTED

Whether the first, second and third crossclaims against defendant Donald Goldberg asserted in the answer of the defendant Gerald Schwartz should have been dismissed and summary judgment granted thereon in favor of defendant Goldberg pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Since the defendants Schwartz and Woodcrest have suffered no damages and since they have pleaded no claim for reimbursement based on the indemnity agreement?

May the defendants Schwartz and Woodcrest interpose the crossclaim against petition Goldberg since it is not a cause of action upon which a defendant may proceed against a person who is liable to him in accordance with the provisions of Rule 13(g) of the Federal Fules of Civil Procedure?

Finally, may Travelers Insurance Company, fiscal agent of the United States of America in matters of Medicare reimbursement, which committed itself to consider the costs to Woodcrest for services rendered by petitioner (ORI) based on the charge made by petitioner (ORI) to Woodcrest, now rescind its commitment and fix the costs to Woodcrest based on the costs to ORI after services were rendered by petitioner (ORI) to Woodcrest based on the commitment by Travelers that the costs to Woodcrest would be the charge made by petitioner (ORI) rather than on petitioner's costs?

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1983

No.

DONALD GOLDBERG, Petitioner

v.

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually, and doing business as WOODCREST NURSING HOME

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Donald Goldberg, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 20, 1983.

OPINIONS BELOW

The opinion dated April 20, 1983 of the Court of Appeals for the Second Circuit whose judgment is herein sought to be reviewed is reprinted in the attachedappendix to this petition at pages A-1-A-52 . The prior judgment of the United States District Court for the Eastern District of New York is also reprinted in the appendix at page A-173 .

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered April 20, 1983. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1)

APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE

Rule 13(g) Cross-Claim Against Co-Party.

> A pleading may state as a cross-claim any claim by one party against a co-party

> arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Rule 56. Summary Judgment

> (b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATEMENT OF CASE

In this action plaintiff seeks to recover amounts allegedly owed by defendants arising out of their participation in the Medicare

Program of the Social Security Act. The amended complaint, among other things, seeks recovery of the sum of $75,862.20 in current financing paid to Woodcrest Nursing Home, a general partnership, between August 30, 1968 and April 19, 1969. To the extent that recovery is not accomplished from defendant Woodcrest Nursing Home partnership, then plaintiff seeks to recover from the individual partners including petitioner Goldberg therefor. Additionally, plaintiff seeks to recover from Gerald Schwartz individually and doing business as Woodcrest Nursing Home as a sole proprietorship, the sum of $58,332.12 for Medicare funds overpaid to defendant Gerald Schwartz for the period January 1, 1970 to June 15, 1970.

In the answer of the defendant Gerald Schwartz, he attempts to allege three cross-

claims against the petitioner Donald B. Goldberg.

As a first crossclaim (Paragraphs 11 through 15 of his answer), defendant Gerald Schwartz, alleges that during the period between August 30, 1968 and April 19, 1969, when the Woodcrest Nursing Home received advance financing payments in the sum of $105,116.00, Goldberg was managing partner of said general partnership; that by virtue of an agreement among the partners, Goldberg was forbidden to incur an obligation for the partnership in excess of $5,000.00 unless the same was approved by a majority in principal of the partners and signed by at least two of them; that the obligation to repay said sum of $105,116.00 was incurred for the Woodcrest Nursing Home by Goldberg in violation of said agreement among the parties without approval

by a majority of them and without the signatures of at least two of them; that by reason of the foregoing, defendant Gerald Schwartz, was required to and did pay to plaintiff $29,253.80, of which $24,253.80 was incurred by Goldberg for the said partnership in violation of the partnership agreement as aforesaid, and if defendant, Gerald Schwartz, be held liable to plaintiff for the sum of $75,862.20, that Goldberg will then be liable to the defendant, Gerald Schwartz, in that sum, plus the sum of $24,253.80 as hereinabove set forth.

As a second crossclaim (Paragraphs 16 and 17 of his answer), defendant, Gerald Schwartz, alleges that during the period from August 30, 1968 to April 18, 1969, at the time the alleged payments from the intermediary were received by Woodcrest Nursing Home general partnership in the sum of $105,116.00,

defendant, Donald D. Goldberg, had a 50% interest in such partnership and was liable for 50% of its liabilities; that defendant, Gerald Schwartz, paid to petitioner the sum of $29,253.80 on account of the aforesaid liability of $105,116.00, and that if he be held liable to plaintiff for the sum of $75,862.00, that Goldberg be liable to him for 50% of $105,116.00 or $52,558.00.

As a third crossclaim (Paragraphs 27 through 29 of his answer), defendant, Gerald Schwartz, repeats the allegations contained in Paragraphs 18 through 26 of his answer (which is the counterclaim alleged against the United States of America), and then goes on to allege that on or about November 29, 1968 Goldberg entered into a certain indemnity agreement referred to therein wherein and whereby he agreed that in the event there be any

disallowance for services rendered by ORI as to rate, then Goldberg would indemnify the partnership.

In Goldberg's answer to the alleged crossclaims, Goldberg denied those allegations contained in the paragraphs of the answer of the defendant, Gerald Schwartz, designated as Paragraphs 12, 13, 14, 15, 17, 18 and 29, and, in addition, set forth various defenses to the crossclaims.

In defense against the first, second and third crossclaims, Goldberg alleged that heretofore the defendants, Gerald Schwartz and Goldberg, as General Partners of Woodcrest Nursing Home had an accounting in proceedings in arbitration of their respective interests in Woodcrest Nursing Home and a balance was struck and an award in accordance therewith was duly rendered in Goldberg's

favor against defendant, Gerald Schwartz, after which a judgment thereon was docketed in the Office of the Clerk of the Supreme Court of the State of New York, County of Queens, on or about November 25, 1975, and that judgment is res adjudicata as to all claims of the defendant, Gerald Schwartz, arising out of the partnership relationship between Gerald Schwartz and Goldberg as General Partners of Woodcrest Nursing Home.

In further defense of the first cross-claim, Goldberg alleged that the agreement among the partners, described in Paragraph 12 of the answer of the defendant, Gerald Schwartz, did not prohibit the acceptance of advance payments which were an advance of working capital on behalf of the partnership, and further that the partnership used and accepted the benefits of the advance payments from the

United States of America and is now estopped to deny the right of the plaintiff to make the advance payments.

The third crossclaim is improperly made in that it does not arise out of nor is it related to the transaction or occurrence that is the subject of the original action and is not such a claim upon which relief can be granted in this action.

The agreement referred to in Paragraph 28 of the third crossclaim of defendant, Gerald Schwartz, refers only to a partial reimbursement required by reason of an incorrect or inappropriate rate, and has in the arbitrators proceedings aforesaid been adjudicated to mean that any liability on Goldberg's part shall be predicated upon a final determination that the charges made by Goldberg and paid by Woodcrest Nursing Home shall not be

reimbursable by virtue of an incorrect or inappropriate rate only. In the arbitration proceedings, Mr. Thomas F. Ryan testified that the $9.00 rate charged by defendant Goldberg was in fact an appropriate rate.

Furthermore, before defendant Schwartz may recover on the crossclaims relating to the indemnity agreement referred to in Paragraph 28 of the answer, he must allege and prove that he has in fact suffered damages for which he seeks indemnification. The facts are, as has been demonstrated in the arbitration proceeding, that defendant is misguided in his claim for indemnity as alleged in his answer claiming the sum of $171,442.00 from defendant Donald D. Goldberg. Correctly, and as was demonstrated in the arbitration proceedings, the amount charged by defendant Goldberg, operating as the Orthopedic Rehabilitation

Institute of Woodcrest were recorded as expenses on the books of Woodcrest Nursing Home Partnership. In turn the partnership billed Medicare for those amounts and received and recorded the same as income. Thus, there is no effect on the partnership profit and loss for the periods involved. The sum of $174,014.00 is the amount billed by Orthopedic Rehabilitation Institute to Woodcrest General Partnership. Against this billing, Woodcrest received $147,988.00 which amount was paid over to ORI for inpatient therapy. The difference was never paid to ORI so that Woodcrest Nursing Home (general partnership) paid to ORI precisely the amount it received, and, therefore, is not "out of pocket" nor did it sustain any loss in any amount. A statement of the account setting forth the amount billed by ORI and the amount received from

Woodcrest is set forth in the appendix. Statement was received in evidence in the arbitration proceedings. It is abundantly clear from the foregoing that no money whatsoever was advanced by Woodcrest General Partnership on account of ORI billing and to date none of these sums paid by Travelers, fiscal intermediary for Department of Health, Education and Welfare has been repaid to it by Woodcrest General Partnership or by Schwartz. Until such repayment is actually made, defendant Woodcrest has sustained no loss or damages and is not entitled to recover thereon from Goldberg. In the absence of such repayment by Woodcrest or Schwartz, to Travelers, payment by Goldberg to Schwartz or Woodcrest General Partnership would constitute unjust enrichment to them. Ergo, this crossclaim by Schwartz

is without any basis in fact or law and should be dismissed. Before any indemnity agreement may be effectuated the event against which it is intended to indemnify must be shown to have occurred. It is the contention of petitioner Goldberg that before the alleged indemnity could become operative, defendant Schwartz must first demonstrate that he is liable for and is required to repay Travelers Insurance Company any amount which it may be determined to owe. Until there is proof that a claim is made by the Government or Travelers which is reduced to judgment, which defendant Schwartz has paid, he may not recover on this indemnity agreement.

Petitioner Donald Goldberg moved for summary judgment with respect to Counts I and II of the amended complaint and the three crossclaims made by defendant Gerald Schwartz,

individually and doing business as Woodcrest Nursing Home. The motion was granted to the extent that Counts I and II of the amended complaint were dismissed as to defendant Goldberg. The cross-motion of the defendant Gerald Schwartz, individually and doing business as Woodcrest Nursing Home, wherein judgment against petitioner Goldberg was sought on the crossclaim was granted, and the judgment was entered accordingly. From that judgment, petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed the judgment of the District Court. The opinion of the Circuit Court is set out at length at page A-1 of the appendix to this petition.

REASONS FOR GRANTING THE WRIT

Summary judgment should have been granted in favor of petitioner Goldberg dismissing the first, second and third crossclaims asserted against him in the answer of the defendant Gerald Schwartz for

(a) The issues presented thereby have heretofore been determined in an arbitration proceeding upon which an award was made to petitioner Goldberg and judgment was entered thereon in the Supreme Court of the State of New York, County of Queens which was affirmed in the Appellate Division of the Supreme Court of the State of New York and leave to appeal to the Court of Appeals was denied both in the Appellate Division and in the Court of Appeals;

(b) The partnership, Woodcrest Nursing Home, accepted and used the funds received as advance payments from the United States of

America and ratified petitioner Goldberg's actions in connection therewith and Schwartz and Woodcrest are thereby estopped to deny receipt and acceptance thereof or the right of the plaintiff to make the advance payments, and have suffered no loss thereby;

(c) The court below having granted the motion of plaintiff to dismiss the counter-claim urged by the defendants Schwartz and Woodcrest against it as set forth in their answer, the third crossclaim against petitioner Goldberg made by the defendant Schwartz, individually and doing business as Woodcrest Nursing Home should likewise be dismissed;

(d) Defendants Schwartz and Woodcrest have suffered no damages nor have they pleaded any to sustain their claim for reimbursement based on the indemnity agreement;

(e) The third crossclaim asserted by

the defendant Schwartz against petitioner Goldberg is untenable for the reason that it is not a cause of action upon which a defendant may proceed against a person who is liable to him for all or part of the plaintiff's claim against him.

(f) Finally, petitioner Goldberg (ORI) indisputably did in fact render services to Woodcrest Nursing Home for which it is entitled to payment, if not on a charge basis of $9.00 for treatment, as authorized by Travelers and claimed by ORI, then on a cost basis as now claimed by Travelers Insurance Company, and therefore the court should remand the matter of reimbursement to Travelers Insurance Company to determine the cost to ORI and fix a reimbursable rate on the basis of that cost.

The issues presented by the first, second and third crossclaims made by the defendant Schwartz against the petitioner Goldberg are identical to the issues submitted to arbitration between the same parties and upon which an award was made and confirmed by the Supreme Court of the State of New York and judgment entered thereon, which was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and leave to appeal to the Court of Appeals was denied. Included in the appendix are the arbitrator's Award (Exhibit "G"), the Judgment entered thereon (Exhibit "H") as confirmed by the Supreme Court, the Order of the New York Court of Appeals denying leave to appeal (Exhibit "I") and the Final Judgment after all appeals had been exhausted (Exhibit "J").

All of the facts relative to the submission of the dispute between the defendants Schwartz and Goldberg relative to Woodcrest Nursing Home (general partnership) are fully and at length set forth in the affidavit of petitioner Goldberg included in the appendix. These included but were not limited to issues relative to accounting between defendants Goldberg and Schwartz as partners in Woodcrest Nursing Home (general partnership) upon which an award was made to petitioner Goldberg on the issue of the current financing and to which defendant Schwartz raised the same issue as in this action in the first and second crossclaims and indemnity agreement raised in the third crossclaim.

In the arbitration proceeding the disputes were essentially between partners and, therefore, partnership accounting was

necessary. It is well settled law that before any claim by one partner against the other may be adjudicated, there must be an accounting and a balance struck. When Gerald Schwartz interposed a counterclaim in the arbitration proceedings against petitioner Goldberg for recovery of alleged Woodcrest Nursing Home Partnership losses, the arbitrators applied that law and an accounting proceeding ensued. Squire v. Wing, 17 A.D.2d 835, 233 N.Y.S.2d 84; Friedland v. Friedland, 12 Misc.2d 349, 175 N.Y.S.2d 264; Weiner v. Burick, 47 Misc.2d 962, 263 N.Y.S.2d 506. Since disputes between partners may be resolved only by accounting, in the arbitration proceedings, the dispute between the partners was determined by an accounting and an award was thereupon made in favor of the petitioner Goldberg in a determination of his share of the profits of the

partnership.

The arbitration award and the final judgment entered thereon is res adjudicata as to all issues between the partners Schwartz and Goldberg in the Woodcrest Nursing Home (general partnership). Rosenberg As Assignees, Etc. v. Delmar Division, Champion International Corp., 56 A.D.2d 577; Schuykill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 355; Matter of Springs Cotton Mills v. Buster Boy Suit Co., Inc., 257 A.D. 196, 88 N.Y.S.2d 295; Dembitzer v. Gutchen, 3 A.D.2d 211, 159 N.Y.S.2d 327, aff'd 3 N.Y.2d 851.

In the Arcadu (250 N.Y. 355) case, the Court stated:

> "upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith. The judgment so entered is regarded

> in all respects as a judgment in an action and is subject to the profits of law relating to such a judgment."

In Schuykill Fuel Corp. v. Nieberg, 250 N.Y. 304, the Court stated at 306-307:

> "A judgment in one action is conclusive in a later one not only as to any matters that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first."

In all cases, the courts have universally held that every award rendered in arbitration proceedings is a complete, final and binding determination of the controversy which may not be attacked. A judgment entered upon such an award is res adjudicata of all matters reasonably comprehended in the dispute submitted to the arbitrators.

In the case at bar, defendant in the New York Supreme Court (Queens County) on the motion to confirm and in the Appellate Court had raised all legal objections to the award. Each of those objections was rejected and overruled. The judgment entered on the award is final. American Insurance Co. (Messenger), 43 N.Y.2d 184; Rembrandt v. Hodges, International, 38 N.Y.2d 502; Matter of Springs Cotton Mills v. Buster Boy Suit Co., 257 A.D. 196, 88 N.Y.S.2d 295, aff'd 300 N.Y. 586; Dembitzer v. Gutchen, 3 A.D.2d 211, 159 N.Y.S.2d 327, aff'd 3 N.Y.2d 851.

It is abundantly clear, therefore, and the law is well settled that the doctrine of res adjudicata is applicable to issues resolved by earlier arbitration and a judgment entered thereon may not be collaterally attached.

Accordingly, the crossclaims of the defendant Schwartz against petitioner Goldberg presenting issues upon which a judgment has been entered in favor of the petitioner Goldberg should be dismissed.

The third crossclaim alleged by defendant Schwartz should be dismissed for it is not one which may be made pursuant to Rule 13 G. The crossclaim is predicated upon an indemnity agreement entered into between Schwartz and Goldberg, but the claim made thereon does not arise out of any claim made by the United States of America against defendant Schwartz upon which petitioner Goldberg might be liable under the indemnity agreement. By its terms that agreement provides for indemnification by Goldberg in favor of defendant Schwartz in the event the claims for services rendered by Goldberg to Woodcrest

are disallowed by the government. However, the government has made no claim for reimbursement on any such items nor is the claim of Schwartz predicated upon any claim for reimbursement or any sums previously paid to the plaintiff. It is abundantly clear that the crossclaim asserted by defendant Schwartz against petitioner Goldberg is therefore not predicated upon a liability of the defendant Schwartz to the plaintiff upon any claim asserted in the complaint and does not arise in any way out of the complaint against defendant Schwartz and, consequently, the third cross-claim of defendant Schwartz against petitioner Goldberg is untenable. Atlantic Corp. v. U.S., (CA 1st 1962) 311 F.2d 907; Fireman's Fund Insurance Co. v. Trobaugh (WD Okla. 1971) 52 FRD 31; Degree of Honor Protective Assoc. v. Charles T. Bisch & Sons, Inc. (D Mass.

1961) 194 F. Supp. 614; Hoosier Casualty Co. of Indianapolis, Ind. v. Fox (ND Iowa 1952) 16 FR Serv. 13g. 11, Case 1

The letter of indemnity referred to in the crossclaim specifically provides that Orthopedic and Rehabilitation Institute (ORI) would indemnify Schwartz only in the event reimbursement is denied "by virtue of incorrect or inappropriate rate." This matter was likewise litigated and decided in the arbitration proceedings hereinabove referred to. In an opinion rendered by the arbitrators, they stated:

> "Nothing in this award shall preclude Gerald Schwartz from kaing a claim on the memorandum dated November 29, 1968 amending the general partnership agreement for the operation of Woodcrest, but only upon the final determination of a court of competent jurisdiction that charges made by Orthopedic and

> Rehabilitation Institute (ORI) and paid by Woodcrest to ORI should not be reimbursed by the appropriate agency by virtue of incorrect or inappropriate rate."

In this connection the court is specifically referred to the letter of Travelers Insurance Company, the government's fiscal intermediary, dated November 19, 1968 written to petitioner Goldberg, wherein it is stated that "we will consider the cost to Woodcrest Nursing Home for the services of the Orthopedic & Rehabilitation Institute as allowable cost under the Medicare program." This specifically refers to the rate or charge made by petitioner Goldberg to Woodcrest which Travelers agreed to accept as the appropriate rate for the services rendered. In the arbitration proceeding, it was proved that petitioner Goldberg's rate or charge was $9.00 per treatment.

Thomas F. Ryan, a representative of Travelers Insurance Company, called as a witness by defendant Schwartz, testified that petitioner Goldberg's rate or charge of $9.00 per visit or treatment was acceptable. The opinion of the arbitrators held that the indemnity agreement should operate only in the event defendant Schwartz proved that reimbursement is denied because of incorrect or inappropriate rate. In the light of the arbitrators' opinion, and the letter of Travelers referred to above, this issue would appear to be res adjudicata in that the rate or charge made by petitioner Goldberg was in fact acceptable to Travelers.

Defendant Schwartz has failed to plead damage or loss. As a matter of law, before any indemnity agreement may be effectuated, the events against which it is intended to indemnify must be shown to have occurred.

Before the Panel of Arbitrators as well as before the Supreme Court and the Appellate Courts, it was argued and petitioner Goldberg contends that before the alleged indemnity agreement could become operative, Schwartz must first demonstrate that he is liable for and is required to repay Travelers Insurance Company any amount which it may be determined to owe. There was no offer of proof before the arbitrators nor is there any allegation in the crossclaims indicating that Schwartz is required or will be required to repay nor that a claim was ever made by the government or Travelers which was reduced to judgment. Matter of Kessler, 8 A.D.2d 105, aff'd 7 N.Y.2d 909; Matter of State Marine Lines, 13 N.Y.2d 206; Matter of John Gibbons Agency, 31 Misc.2d 876, 217 N.Y.S.2d 788.

At best assuming the obligation of

Schwartz with respect to petitioner Goldberg's rate or charge should be finally determined, at that time the amount of the determination with respect to the charges would be no more than a claim. It is a determination in the sense that it finally settles a disputed claim. That determination would not be present liability of defendant Schwartz. The plaintiff would be required to bring suit against Schwartz and reduce the claim to a litigated judgment. Brown v. Mechanic & Traders Bank, 43 A.D. 173; Cody v. Gaines, 279 A.D. 910; Barone v. Reggie, 12 Misc.2d 533, 169 N.Y.S.2d 777; DeAngelis v. Smith, 95 N.Y.S.2d 52 (not otherwise reported); 755 Seventh Avenue Corporation v. Corral, 266 N.Y. 157, 161.

In any event, defendant Schwartz's crossclaim was at the time of the arbitration proceedings and still is today, premature and

was, therefore, properly denied and its denial was affirmed. Accordingly, defendant Schwartz has failed to demonstrate any basis for indemnity as alleged in the third crossclaim and that too should be dismissed.

Furthermore, petitioner Goldberg was a partner of Woodcrest Nursing Home with a 50% interest therein. In the event the judgment in favor of defendant Schwartz against Goldberg on the crossclaims should be sustained, petitioner Goldberg should be entitled to a credit of 50% thereof as such a partner.

Finally, without dispute, petitioner Goldberg did render services to Woodcrest under the authority of the letter of Travelers to Goldberg dated November 19, 1968 (Ex. M2), authorizing Goldberg to render services on a cost or charge basis. Pursuant thereto, services were rendered by Goldberg (ORI) to

Woodcrest. However, Travelers unilaterally and without just cause rescinded that authority and elected to compute the value of the services rendered by Goldberg to ORI on a cost basis to ORI, contrary to the letter of November 19, 1968 (Ex. M2). However, this is not a reason for not compensating Woodcrest for the services rendered if not on a rate or charge basis as authorized by that letter, then on a cost basis to be computed by Travelers. Accordingly, the matter should be remanded to Travelers for the computation of such an allowance to Woodcrest.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Donald Goldberg

Petitioner

H. Stuart Klopper

Counsel for Petitioner

170 Old Country Road

Mineola, New York 11501

July 15, 1983

STATE OF NEW YORK)
)ss.:
COUNTY OF)

DONALD GOLDBERG, being duly sworn, deposes and says:

I am the petitioner in the within action. I have read the foregoing Petition for a Writ of Certiorari and know the contents thereof and that the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and that to those matters, I believe it to be true.

Donald Goldberg

Sworn to before me this

day of , 1983.

APPENDIX

APPENDIX

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United States Court of Appeals
Filed
April 20, 1983
Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 561, 660 August Term, 1982

(Argued: January 3, 1983

Decided: April 20, 1983

Docket Nos. 82-6164, 82-6174

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v. -

WOODCREST NURSING HOME, a Partnership, GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home, DONALD GOLDBERG, IRWIN M. ROSENTHAL, JACK E. BRONSTON, and HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of Lawrence Peirez,

Defendants,

IRWIN M. ROSENTHAL, JACK E. BRONSTON, and HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of Lawrence Peirez,

Defendants-Appellees,

- v -

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home,

Defendants-Appellees-Appellants,

- v. -

DONALD GOLDBERG,

Defendant-Appellant-Appellee.

Before: KEARSE, WINTER, and PRATT, Circuit Judges.

Appeals from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, which, inter alia, dismissed due process counterclaim of defendant Schwartz as a provider of Medicare services, and awarded Schwartz $273,449.98 on a cross-claim against codefendant Goldberg.

Affirmed.

CHARLES S. KLEINBERG, Assistant United States Attorney, Brooklyn, New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, Miles M. Tepper, Assistant United States Attorney, Brooklyn, New York, on the brief), for Plaintiff-Appellee.

E. COOKE RAND, P.C., New York, New York, filed a brief for Defendants Appellees.

CHARLES HAYDON, New York, New York (Dublirer, Haydon, Straci & Victor, New York, New York, on the brief), for Defendants-Appellees-Appellants.

H. STUART KLOPPER, Mineola, New York, filed a brief for Defendant-Appellant-Appellee.

KEARSE, Circuit Judge:

These appeals arise out of the adjudications of (1) a claim of plaintiff United States to recover overpayments made by the Secretary of Health, Education and Welfare ("Secretary") to defendant Gerald Schwartz, individually and doing business as Woodcrest Nursing Home ("Woodcrest") as

a provider of Medicare services, (2) a counterclaim by Schwartz asserting a want of due process in the administrative treatment of Woodcrest's Medicare reimbursement claims, and (3) cross-claims by Schwartz against his codefendants. Schwartz appeals from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, insofar as it dismissed Schwartz's counterclaim and failed to order that the other defendants pay a total of 70% of the United States' judgment--entered in the sum of $214,039.95, plus interest--against Schwartz.[1] Defendant Donald Goldberg appeals from so much of the court's judgment as granted Schwartz's cross-claim against him in the sum of $273,449.98, plus interest. For the

reasons below, we affirm the judgment.

I. BACKGROUND

A. The Claims of Woodcrest for Reimbursement from the Secretary

The controversy concerns the operations of Woodcrest, as a "provider" under Part A of the Medicare Program of the Social Security Act, 42 U.S.C. §§ 1395c to 1395i-2 (1976 & Supp. IV 1980), from August 30, 1968, through April 19, 1969, and Woodcrest's claims for reimbursement for services rendered to it during that period by the Orthopedic and Rehabilitation Institute ("ORI"). During that period, Woodcrest was a general partnership whose partners were Schwartz, Goldberg, Lawrence Peirez, and defendants Irwin M. Rosenthal and Jack E. Bronston. Under the partnership agreement as amended in November 1968, Goldberg was the managing partner of

Woodcrest, having full charge of its operations and sole power to enter into contracts on its behalf.

Goldberg was also the owner of ORI, from which Woodcrest purchased services. Under Medicare regulations, since Goldberg owned ORI and an interest in Woodcrest, ORI was considered "related" to Woodcrest, see 42 C.F.R. § 405.427(b), set forth in note 3 infra, and Woodcrest therefore normally would not be entitled to reimbursement from the Secretary for more than the actual cost to ORI of providing the services to Woodcrest. 42 C.F.R. § 405.427.[2] In light of these regulations, the partners reached a special agreement with respect to services supplied to Woodcrest by ORI, as reflected in a memorandum dated November 29, 1968 (hereinafter "ORI Repayment Agreement"):

> [i]n the event[ ]that the United States of America or its appropriate governmental sub-division, or any appropriate insurance carrier or fiscal agent or agency, under and pursuant to the Medicare or similar successor program, determines at any time, up to and including the annual audit for any year, but not thereafter, that any charge or charges made by the Orthopedic and Rehabilitation Institute, during such year to the Woodcrest Nursing Home, for care rendered to patients of the nursing home are by virtue of incorrect or inappropriate rate, not reimbursable in part, then such amount or amounts so determined to be excessive or non-reimbursable, will be borne by the Orthopedic and Rehabilitation Institute and repaid to the General Partnership within thirty (30) days after such determination by such governmental or other Agency.

In accordance with the general statutory scheme governing Medicare reimbursement, see 42 U.S.C. § 1395h, Woodcrest designated a private insurance carrier, to wit, Travelers Insurance

Company ("Travelers"), to serve as the fiscal intermediary through which Woodcrest was to receive payments from the Secretary for the "reasonable costs" incurred to provide services to Medicare beneficiaries. Woodcrest provided services, some of which it purchased from ORI, and Travelers made both interim payments to Woodcrest based on the estimated cost of services furnished, see 42 U.S.C. § 1395g; 42 C.F.R. § 405.454(e) (1981), and current financing payments, see id. § 405.454(g).

Eventually Woodcrest submitted to Travelers detailed claims of reimbursable costs for the period in question, which included $171,442 in payments it had made to ORI. Travelers engaged the accounting firm of Peat, Marwick and Mitchell ("Peat, Marwick") to audit

Woodcrest's claims and advised Peat, Marwick that ORI was an organization "related" to Woodcrest and that ORI's costs would therefore have to be determined by auditing ORI's books and records.

ORI, however, refused to make its books and records available foraudit. Accordingly, in light of the statutory provision that "no [reimbursement] payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine that amounts due such provider," 42 U.S.C. § 1395(g), Woodcrest's claims for reimbursement for its payments to ORI were disallowed. Initial notice of the denial was given in August 1981; the decision became final in 1973.

In October 1983, Schwartz and

Goldberg (who by then were no longer partners, see infra) appealed Travelers' decision to an intermediary hearing panel, arguing that Woodcrest's ORI claims should have been granted pursuant to the statutory exception to the general rule limiting reimbursement to ORI's actual costs, 42 C.F.R. § 405.427, see note 2 supra. They contended that Woodcrest was entitled to receive the full amount of ORI's charges because "a substantial part of [ORI's] business activity of the type carried on with [Woodcrest] [was] transacted with others than [Woodcrest] and organizations related to [ORI] by common ownership or control . . . ." § 405.427(d). Travelers responded that ORI's records would have to be made available to substantiate these claims.

In the meantime, on April 19, 1969, Schwartz had purchased the partnership interests of the other Woodcrest partners, and in April 1981 Goldberg filed a demand for arbitration against Schwartz, seeking, inter alia, an accounting for Goldberg's share of Woodcrest's profits. Schwartz counterclaimed, seeking, inter alia, payment from Goldberg under the ORI Repayment Agreement. Eventually, the arbitrators awarded Goldberg $82, 168 on his claim, dismissed Schwartz's counterclaim without prejudice, and directed Goldberg to cooperate in Woodcrest's quest for reimbursement from the Secretary:

> [n]othing in this AWARD shall preclude Gerald Schwartz from making a claim on the memorandum dated November 29, 1968 amending the General Partnership Agreement for the operation of Woodcrest, but

> only upon the final determination of a court of competent jurisdiction that charges made by the Orthopedic and Rehabilitation [sic] Institute ("ORI") and paid by Woodcrest to ORI should not be reimbursed by the appropriate agency by virtue of incorrect or inappropriate rate. Dr. Goldberg is directed to cooperate fully in the process of effecting such determination.

Opinion of Arbitrators dated August 1, 1985 ("Arbitrators' Opinion") (emphasis added).

Proceedings on the intermediary appeal, begun in 1983, continued into 1977, and included discovery, conferences, and a hearing. ORI made available to the hearing panel certain of its books and records but withheld documents that would have allowed the panel to determine such questions as the extent of ORI's services to unrelated entities and whether ORI's charges to

Woodcrest were in line with its charges to the general public. Accordingly, the panel held that Woodcrest had not met its burden of showing the applicability of the statutory exception. In so ruling the panel noted that the ORI records that had been supplied indicated that "a substantial part of ORI's activity was conducted with Woodcrest Nursing Home and not as called for by regulations, with parties unrelated to the provider by common ownership or control." Intermediary Hearing Decision No. T-26 dated May 5, 1977, at 3.

B. Proceedings Below

As a result of the denial of Woodcrest's claims for reimbursement for its payments to ORI, Woodcrest's entitlement to Medicare reimbursement was some $76,000 less than the amount of

current financing payments made to Woodcrest by Travelers for the period in question. Accordingly, in January 1977, the United States commenced this action to recover overpayments made to Woodcrest.[3] Schwartz interposed a counterclaim for $171,422, the amount of Woodcrest's disallowed payments to ORI, contending that Travelers' determination that Woodcrest was not entitled to reimbursement for its payments to ORI was arbitrary and capricious. Schwartz cross-claimed against Goldberg in the same amount, contending, inter alia, that if Woodcrest's payments to ORI were not reimbursable, Goldberg was liable to Schwartz under the ORI Repayment Agreement.

Following an exchange of pleadings and motions for summary judgment, the

district court remanded to Travelers its May 1977 determination for further findings and reconsideration. On remand, several discovery requests were made to Woodcrest and ORI. ORI provided some of the data requested of it, but not others. As a result, although the panel found that ORI had performed services for Woodcrest and for others unrelated to ORI, the panel was unable to determine whether the part of ORI's business activity that was conducted with the latter group was "substantial" within the meaning of § 405.427(d), since the ratio of ORI's services for Woodcrest to ORI's services for others could not be determined. As to each category of services the panel stated that "[t]he extent of the services . . . ha[d] not been established by convincing evidence

to the satisfaction of . . . Travelers." Remand Decision dated June 6, 1980, at 3, 5. The panel thus concluded that Woodcrest was not entitled to receive reimbursement for its payments to ORI:

> In order that reimbursement for such services may be a part of Woodcrest's Medicare reimbursable costs thereby permitting a payment to ORI which would be considered reimbursable as a Medicare cost there must be an auditable basis for making a determination of said costs. The burden of proof is not on the intermediary auditor. . . . [T]here is no sound auditable way to make the cost determination because the necessary records were not made available to the Intermediary. The Panel does not find that the Intermediary has erred and must therefore sustain the original Panel decision.

Id. at 7.

After receiving Traveler's new findings, the district court granted summary judgment in favor of the United

States against Schwartz but dismissed its claims against all other defendants. The court dismissed Schwartz's counterclaim against the United States, but granted summary judgment in favor of Schwartz on his cross-claim against Goldberg "for failure to cooperate under the arbitration decision." Order dated May 24, 1982. These appeals followed.

DISCUSSION

On appeal, Schwartz argues chiefly that the judgment should be reversed insofar as it dismissed his due process counterclaim challenging the procedures for review of Travelers' rejection of Woodcrest's reimbursement claim.[4] Goldberg contends chiefly that the court erred in granting judgment against him because Schwartz's cross-claim was barred by principles of res judicata.

Finding no merit in any of the appellants' challenges to the judgment, we affirm.

A. Schwartz's Due Process Claim

Part A of the Medicare Program, entitled "Hospital Insurance Benefits for the Aged and Disabled", 42 U.S.C. §§ 1395c to 1395i-2, is a government-financed program designed to provide insurance, principally for persons over the age of 65, against the cost of institutional health services, such as hospital and nursing home fees. Part B, entitled "Supplementary Medical Insurance Benefits for the Aged and Disabled," 42 U.S.C. §§ 1395j to 1395w (1976 & Supp. IV 1980), is a voluntary program funded partly by contributions of the individuals enrolled and partly by the government, and is designed to

reimburse persons who are disabled or over the age of 65 for a portion of the cost of certain medical expenses not covered by Part A, such as physician services, outpatient physical therapy, x-rays, and laboratory tests.

Schwartz's principal claim on appeal is that he was denied due process because he was afforded no review by the Secretary with respect to Travelers' rejection of Woodcrest's ORI claims and because the panel that rendered that ultimate decision was appointed by the same entity, i.e., Travelers, that made the initial decision to deny those claims. While we recognize that Woodcrest was a provider of services under Part A of the Medicare Program, we conclude that Schwartz's contention must be rejected on the basis of the

reasoning of the Supreme Court in Schweiker v. McClure, 456 U.S. 188 (1982), rejecting similar claims on behalf of beneficiaries of Part B. Only Schwartz's claim that there should have been review by the Secretary merits extended discussion.[5]

1. Part B and McClure

McClure arose out of decisions by hearing officers denying the claims of three individuals seeking reimbursement for their expenditures for certain services under Part B. The claimants contended that the fact that the Secretary provided no review of the decision of the hearing officers denied them due process of law. After a detailed review of the existing procedures, the Supreme Court rejected this contention. 456 U.S. at 200. The Court noted that in

order to make the administration of Part B more efficient, Congress had authorized the Secretary to contract with private insurance carriers to administer the payment of qualifying claims. Id. at 190. Part B claimants submit claims to the carrier for reimbursement for services they have received; the carrier decides initially whether the services were medically necessary, whether the charges are reasonable, and whether the claim is otherwise covered by Part B. Id. at 191; see 42 U.S.C. § 1395y(a); 42 C.F.R. § 405.803(b)(1981).

A claimant who is dissatisfied with the initial determination has one or more opportunities to appeal. First he is entitled to a "review determination," in which he may submit written evidence and arguments of fact and law to a

carrier employee other than the initial decisionmaker; this employee then reviews the record and the written submissios and either affirms or adjusts the initial determination. See 42 C.F.R. §§ 405.807-405.812 (1981). If the claimant is still dissatisfied and if the amount in dispute is $100 or more, the claimant has a right to an oral hearing before a hearing officer, appointed by the carrier, who has not previously participated in the case. See 42 U.S.C. § 1395u(b)(3)(C); 42 C.F.R. §§ 405.820-405.835 (1981); Schweiker v. McClure, supre, 456 U.S. at 191. Unless the carrier or the hearing officer decides to reopen the proceeding, the hearing officer's decision is "final and binding upon all parties to the hearing . . . ." 42 C.F.R. §

405.835. Neither the statute nor any regulation makes provision for further review of the hearing officer's decision. See United States v. Erika, Inc., 456 U.S. 201 (1982).

The Court pointed out that there is a "strong presumption in favor of the validity of congressional action," Schweiker v. McClure, supra, 456 U.S. at 200, and that the Court had recognized Congress's "'solicitude for fair procedure,'" id. (quoting Califano v. Yamasaki, 442 U.S. 682, 693 (1973), and it concluded that the McClure claimants had not shown that the Part B precedures were unfair.[6]

The Court noted that the district court, in holding that due process required additional review by a government hearing officer, had analyzed

the three factors made relevant by Mathews v. Eldridge, 424 U.S. 319 (1976), to such a due process inquiry, to wit:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Supreme Court found that its own analysis of the second Mathews factor led it to the opposite conclusion. Referring to the first and third Matthews factors, the Court assumed the correctness of the district court's view that the private interest in Part B payments was "'considerable,'

though 'not quite as precious as the right to receive welfare or social security benefits,'" and the district court's estimate that the additional cost and inconvenience of providing administrative law judges "would not be unduly burdensome." Schweiker v. McClure, supra, 456 U.S. at 198. As to the second Mathews factor, however, the Supreme Court rejected the district court's views (1) that the existing procedures were constitutionally inadequate because the carriers' hearing officers were not required to have law degrees or other formal training and (2) that more strigent requirements would reduce the risk of erroneous determinations. The Court stated that

> the record does not support these conclusions. The Secretary has directed carriers to select as a

hearing officer

> "an attorney or other qualified individual with the ability to conduct formal hearings and with a general understanding of medical matters and terminology. The [hearing officer] must have thorough knowledge of the Medicare program and the statutory authority and regulations upon which it is based, as well as rulings, policy statements, and general instructions pertinent to the Medicare Bureau." App., 22, quoting Department of Health and Welfare Services, Medicare Part B Carriers Manual, p. 12-21 (emphasis added).

The District Court did not identify any specific deficiencies in the Secretary's selection criteria. By definition, a "qualified" individual already possessing "ability" and "thorough knowledge" would not require further training. The court's further general concern that hearing officers "are not required to satisfy any threshold criteria" overlooks the Secretary's quoted regulation.

Id. at 199 (footnote omitted). In sum, the Court concluded that the availability of appellate review by new hearing officers, together with the Secretary's criteria for the selection of these officers, provided sufficient procedural protection.

2. Part A and Woodcrest

We see no significant difference in the Part A procedures under which Woodcrest's reimbursement claims were determined here.[7] The structure--the Secretary relying on carriers or other intermediaries to review reimbursement claims--was the same; the initial decisionmaking processes of the carriers were parallel; and the appellate procedures were not materially different.

Part A of the Medicare Program provides that if any group or association

of providers wishes to have its Part A payments made through a public or private agency or organization such as Travelers and nominates such as agency or organization for this purpose, the Secretary is authorized to enter into an agreement providing for the determination by the agency or organization of payments to be made to the providers. 42 U.S.C. § 1395h(a). Thus, just as Part B claimants request reimbursement from the carrier on the basis of their expenditures for services, Part A providers such as Woodcrest seek reimbursement from the fiscal intermediary on the basis of the cost of their services. See 42 C.F.R. § 405.453(f)(1981).

Within a reasonable time after receipt of a Part A provider's cost report, the intermediary analyzes the

report, undertakes any necessary audit of the report, and furnishes the provider and any related organization of the provider a notice that reflects the intermediary's determination of the amount of reimbursement; if the intermediary's determination differs from the claim submitted, the notice states the reasons for the difference. See id. § 405.1803. Thus, just as Part B carriers determine whether claims are for reasonable amounts for medically necessary services and are otherwise covered by Part B, the Part A intermediaries determine whether and to what extent the providers' claims are for reasonable costs that are reimbursable under Part A.

Finally, the appeal procedure for claims of Part A providers differs from

the appeal procedure for Part B beneficiaries in that the preliminary step of a written appeal to an employee of the carrier is omitted. If a Part A provider is dissatisfied with the intermediary's claim determination, and the amount in dispute is at least $1,000, the provider is entitled immediately to request a hearing before a hearing officer, or a panel of such officers. See id. §§ 405.1811(a). These appellate officers are appointed by the intermediary; they must have had no prior role in the decision, and they must be "persons knowledgeable in the field of health care reimbursement." Id. § 405.1817. The appellate procedures permit the parties to conduct prehearing discovery, id. § 405.1821, to call and cross-examine witnesses, id. § 405.1825, and

to present documentary evidence and arguments, id. § 405.1823. The hearing officers are required to make a de novo determination of the claims after "inquir[ing] fully into all of the matters at issue and . . . receiv[ing] into evidence the testimony and any documents which are relevant and material to such matters." Id. § 405.1819. The officers are empowered to call for such additional evidence as they deem relevant and material. Id. The hearing officers render a written decision, id. § 405.1831, and unless they decide to reopen their determination, see id. § 405.1885(a), the decision is "final and binding upon all parties to the hearing . . . ." Id. § 405.1833. Neither the statute nor any regulation makes provision for further review of the hearing

officer's decision as to such claims.

These procedures seem adequately designed to provide a fair opportunity for providers to obtain full and meaningful review of the carriers' determinations, and Schwartz has pointed out to us no respect in which they are unfair.[8] The availability of procedures for the prehearing discovery of evidence, the opportunity to present all relevant and material evidence, to cross-examine witnesses, and to present all pertinent arguments to hearing officers knowledgeable in the health care reimbursement field, together with the obligation imposed on those officers to make a full-scale inquiry and de novo determination, provide adequate safeguards against the risk that the carrier has made an erroneous initial determination.[9] We do not

regard the difference between these appellate procedures and those for Part B beneficiaries as material. It is true that the availability under Part B of an initial appeal to an employee of the carrier, prior to the final appeal to a hearing officer, automatically increases the chance of a favorable decision on the claim. But this initial appeal is limited to the presentation of written materials, and its omission under Part A seems insignificant beside the expansive opportunities before the final hearing panel. We note, finally, that there was no suggestion in McClure that the Court's conclusion as to the adequacy of the Part B procedures turned upon the opportunity to make a written presentation to a carrier employee or even upon the fact that two appellate steps,

rather than one, were available. In short, we conclude that the procedures followed by Travelers in determining Woodcrest's claims and the fact that there was no further review of the appellate panel's decision did not deprive Schwartz of due process.

B. Goldberg's Claims

The district court granted judgment in favor of Schwartz on his cross-claim against Goldberg under the ORI Repayment Agreement, finding that Goldberg had failed to cooperate as ordered by the arbitration decision. Goldberg challenges this portion of the judgment on a number of grounds. His principal contention is that the issues raised by Schwartz's cross-claim had previously been submitted to arbitration, and that

the arbitrators' award, which was confirmed by the appropriate state courts, became res judicata on these issues. This argument must be rejected on the basis of the Arbitrators' Opinion itself.

In 1975 the arbitrators rejected Schwartz's claim that Goldberg was liable to him under the ORI Repayment Agreement. At that time, however, although Travelers had denied Woodcrest's claims for reimbursement for its payments to ORI, there was pending the appeal by Schwartz and Goldberg, seeking payment of those claims under the exception provided by 42 C.F.R. § 405.427(d). Accordingly, Schwartz's claim in 1985 was premature, and in dismissing it the arbitrators stated explicitly that nothing in their award

was to preclude Schwartz from asserting such a claim against Goldberg upon a final judicial determination[10] that Woodcrest should not be reimbursed for its ORI payments by virtue of incorrect or inappropriate rates. See Arbitrators' Opinion set forth in full in Part I.A. above. Hence nothing could be clearer than the fact that the arbitrators' award was not a final determination of the rights of Schwartz and Goldberg under the ORI Repayment Agreement. The court confirmed the award without modification, and the fact that the award was judically confirmed does not imbue it with any greater finality, on this undecided issue, than the arbitrators intended it to have.

As to the merits of Schwartz's cross-claim, we are unpersuaded that the

entry of judgment against Goldberg was improper. The arbitrators did not simply decline to decide the question of Schwartz's rights under the ORI Repayment Agreement; they also "directed" Goldberg "to cooperate fully" in the adjudication of these reimbursement claims. Id. It is entirely proper for arbitrators "to direct such conduct of the parties as is necessary to the settlement of the matters in dispute," Ruppert v. Engelhofer, 3 N.Y.2d 576, 581, 170 N.Y.S.2d 785, 788 (1958); accord 6 C.J.S. Arbitration § 110, at 342 (1975), and the district court's finding here that Goldberg's conduct violated the arbitrators' directive was not error. Apparently there was no dispute in the district court as to the

fact that Goldberg did not fully cooperate--even after remand by the court for reconsideration--in the hearing panel's review of Woodcrest's claims regarding its ORI Payments. At every stage, the hearing officials stated that ORI had withheld needed information, with the result that its costs--the maximum rate of reimbursement normally allowed under 42 C.F.R. § 405.427(a)--could not be determined. In the circumstances, we find no error.

CONCLUSION

The judgment of the district court is affirmed.

FOOTNOTES

[1] Although the notice of appeal filed by Schwartz is styled an appeal by both Schwartz and Woodcrest, the judgment entered infavor of the United States ran only against Schwartz. Hence we refer to the appeal as that of Schwartz.

Schwartz's notice of appeal stated that he appealed from so much of the judgment as (1) granted the claim of the United States against him, (2) dismissed his counterclaim against the United States, (3) dismissed the claim of the United States against defendants other than Schwartz and Woodcrest, and (4) failed to award him judgment against defendants Goldberg, Rosenthal, Bronston and the Peirez defendants. Schwartz's brief on appeal pursues only the second and fourth of these challenges, as he

argues that (A) the dismissal of the counterclaim should be reversed, and (b) if the dismissal of the counterclaim is affirmed, he should be granted judgment against the other defendants for a total of 70% of the amount of the United States' judgment against him.

2 42 C.F.R. § 405.427 provides, in pertinent part, as follows:

> (a) Principle. Costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.
>
> (b) Definitions-(1) Related to provider. Related to the provider means that the provider to a significant extent is associated or affiliated with or has control

of or is controlled by the organization furnishing the service,s facilities, or supplies.

(2) Common ownership. Common ownership exists when an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider.

. . . .

(d) Exception. An exception is provided to this general principle if the provider demonstrates by convincing evidence to the satisfaction of the fiscal intermediary (or, where the provider has not nominated a fiscal intermediary, the Health Care Financing Administration), that the supplying organization is a bona fide separate organization; that a substantial part of its business activity of the type carried on with the provider is transacted with others than the provider and organizations related to the supplier by common ownership or control and there is an open, competitive market for the type of services, facilities, or supplies furnished by

> the organization; that the services, facilities, or supplies are those which commonly are obtained by institutions such as the provider from other organizations and are not a basic element of patient care ordinarily furnished directly to patients by such institutions; and that the charge to the provider is in line with the charge for such services, facilities, or supplies in the open market and no more than the charge made under comparable circumstances to others by the organization for such services, facilities, or supplies. In such cases, the charge by the supplier to the provider for such services, facilities, or supplies shall be allowable as cost.

[3] An additional claim was asserted against Schwartz with respect to a later period, for overpayment due to various acounting deficiencies.

[4] Schwartz's additional complaint that the court erred in failing to grant him judgment against his codefendants for 70% of the United States' judgment

against him is baseless. Although the "WHEREFORE" clause of Schwartz's answer requested judgment "[a]djusting the claims among the defendant," Schwartz had not asserted a cross-claim against any defendant other than Goldberg. He therefore was not entitled to judgment against any other defendant.

5 Schwartz's claim that the panel that eventually denied Woodcrest's claims was improperly constituted because it was appointed by Travelers is squarely foreclosed by Schweiker v. McClure. While recognizing that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," the McClure Court noted that there is a

> presumption that the hearing officers who decide Part B claims are unbiased. See Withrow v. Larkin, 421 U.S.

> 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941). This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. See Gibson v. Berryhill, 411 U.S. 564, 578-579 (1973); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). . . . But the burden of establishing a disqualifying interest rests on the party making the assertion.

Id. at 195-96 (footnote omitted). The Court noted that under Part B, carriers follow prescribed federal procedures and pay all allowed Part B claims out of funds provided by the federal government, not from their own funds. Id. at 196. If disappointed claimants seek review, the carrier appoints as intermediate reviewers and ultimate hearing officers persons who have not participated in any prior stage of the claim's adjudication, id. at 191, and the salaries of these hearing officers are paid

by the federal government, id. at 196. Thus, the McClure Court, having noted that there was no claim of "actual" bias on the part of the hearing officers, id. at 195 n.8, rejected this portion of the due process claim stating that, "[i]n the absence of proof of financial interest on the part of the carriers there is no basis for assuming a derivative bias among their hearing officers." Id. at 197.

Schwartz's contention in the present case is indistinguishable. Under Part A, as under Part B, the intermediaries such as Travelers reimburse providers from federal, and not their own, funds. 42 U.S.C. § 1395g. The fees and expenses of the hearing officers are paid by the federal government. See 42 U.S.C. § 401(g)(1),

1395h(c), 1395(h). And the providers operate under contracts that require compliance with standards prescribed by the statute and the Secretary. See 42 U.S.C. § 1395(h); 42 C.F.R. §§ 421.100, 421.110, 421.126 (1981). Thus there is no basis "for assuming a derivative bias" on the part of Travelers' hearing panel. As Schwartz has alleged no financial interest or conflict of interest on the part of Travelers, nor any other reason for disqualification of the hearing panel, this claim was properly rejected.

6 The McClure Court's observations, as to the availability of noncarrier appellate review under Part A, see 456 U.S. at 198 & n.12, are not pertinent to the present case. Such review is not available for provider claims relating

to cost-reporting periods that ended prior to june 30, 1983. See note 8 infra.

7 With respect to the period covered by Woodcrest's ORI claims, i.e., August 30, 1968 to April 19, 1969, intermediary claim review procedures were not governed by statute or regulation. The first regulations by the Secretary of intermediaries' procedures for review of their initial determinations became effective on May 27, 1972, and applied only to cost-reporting periods ending on or after December 31, 1971. 42 C.F.R. § 405.1801(c). See generally 37 Fed. Reg. 10,722-25 (1982) (codified at 20 C.F.R. §§ 405.490-.499i (1973), "[r]equir[ing] intermediaries to institute review procedures for providers dissatisfied with intermediaries'

determinations on cost reports"). These regulations were soon augmented by more detailed specifications as to the appellate procedures to be followed by intermediaries. See 42 C.F.R. §§ 405.1801-.1833; id. §§ 405.1881-.1889.

The appellate review of Woodcrest's ORI claims was commenced in October 1973 and extended to May 1977. Although it was not required to do so, Travelers apparently followed the procedures set forth in §§ 405.1801.1833 in reviewing its determination of these pre-1971 claims. Hence we discuss the adequacy of the procedures provided by those sections.

8 We reject Schwartz's contention that Congress' enactment in 1982 of legislation establishing a Provider Reimbursement Review Board to provide

agency review of Part A provider claims for cost-reporting periods ending on or after June 30, 1983, see 42 U.S.C. § 1395oo; 42 C.F.R. § 405.1835-.1877, bespoke a belief by Congress that the earlier procedures were constitutionally deficient. We have found no such deficiency, and the legislative history indicates only that Congress thought that further review as "desirable," see H.R. Rep. No. 92-231, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4989, 5094, not that it was constitutionally necessary.

We also reject Schwartz's effort to distinguish McClure on the basis that there are far fewer Part A providers than Part B beneficiaries, and hence that the burden on the government of allowing review of Part A claims would

not be heavy. The difference in the numbers of anticipated Part A and Part B appeals is heardly pertinent, however, since the McClure Court assumed that even Part B review "would not be unduly burdensome." Id. at 198.

9 The McClure Court noted that its conclusions as to the adequacy of the Secretary's criteria for selection of hearing officers were confirmed by the evidence in the record as to the qualifications of nine hearing officers: "[t]wo were retired administrative law judges with 15 to 18 years of judging experience, five and extensive experience in medicine or medical insurance, one had been a practicing attorney for 20 years, and one was an attorney with 42 years experience in the insurance industry who was self-employed as an

insurance adjuster." 456 U.S. at 200 n.15. Our conclusion in the present case that the procedures afforded Woodcrest did not result in a deprivation of due process is similarly buttressed by the evidence of record as to the qualifications of the Travelers-appointed hearing panel that reviewed Woodcrest's claims. The panel was composed of one person with 18 years' experience in the health service industry, including many years as auditor or comptroller of various hospitals; one person trained as an accountant who had several years' experience in Medicare reimbursement matters; and one person who was then a hospital comptroller with fifteen years' association with the health care field and six years of practice with a major accounting firm. Two of the three panel

members had a total of nineteen years' experience as members of the Hospital Financial Management Association.

10 We reject as meritless Goldberg's contention that Schwartz's cross-claim was premature because Schwartz had not yet sustained loss or damage for which he was entitled to be indemnified. The cross-claim was raised conditionally, as Schwartz asserted that "in the event" he was held liable on the United States' claim he was entitled to payment pro tanto from Goldberg. Nor was judgment on the crpss-claim entered without the necessary predicate of judgment in favor of the United States against Schwartz.

We have also considered and rejected Goldberg's other contentions. They do not merit discussion.

AMENDED
COMPLAINT

Civil Action
No. 76 C 1101

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

Plaintiff, :

- against - :

WOODCREST NURSING HOME, a partner-: ship; GERALD SCHWARTZ, individually and doing business : as Woodcrest Nursing Home; DONALD D. GOLDBERG; IRWIN : M. ROSENTHAL; JACK E. BRONSTON; and HILDA PEIREZ, : WILLIAM PEIREZ, and BARBARA KIRBY, as Executors of the Estate : of Lawrence Peirez,

:

Defendants.

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The UNITED STATES OF AMERICA, by its attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York, for its amended complaint alleges as follows:

JURISDICTION

1. This is a civil action brought by the United States of America to recover amounts owing by defendants in connection with their participation, as more fully described hereinafter, in the Medicare Program of the Social Security Act, 42 U.S.C. §1395 et seq. (sometime hereinafter referred to as the "Medicare Program").

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1345.

3. Plaintiff's claims relate to funds advanced to the operators of the facility known as "Woodcrest Nursing Home," which is located at 119-09 26th Avenue, College Point, New York 11354, within the jurisdiction of this Court.

COURT I--CAUSE OF ACTION AGAINST
DEFENDANT WOODCREST NURSING HOME

4. Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "3" hereof.

5. During the period from August 30, 1968 to April 19, 1969, Woodcrest Nursing Home was operated by the defendant WOODCREST NURSING HOME, a general partnership which was comprised of Gerald Schwartz, Donald D. Goldberg, Irwin M. Rosenthal, Jack E. Bronston and Lawrence Peirez.

6. During the period from August 30, 1968 to April 19, 1969 defendant WOODCREST NURSING HOME participated in the Medicare Program as a provider of services thereunder.

7. Under 20 C.F.R. §405.454, promulgated by the Secretary of Health,

Education and Welfare pursuant to 42 U.S.C. §1395hh, defendant WOODCREST NURSING HOME was authorized to obtain, and did so obtain, "current financing payments" from the Intermediary.

8. During the period referred to in paragraph "5" hereof defendant WOODCREST NURSING HOME received current financing payments from the Intermediary in the aggregate amount of $105,116.

9. The net amount of current financing presently outstanding and owing by the defendant WOODCREST NURSING HOME is $75,862.20 plus accrued interest.

10. Demand has been made upon defendant WOODCREST NURSING HOME, through its partner Gerald Schwartz, for the repayment of said indebtedness, but said defendant has failed or refused to repay same.

11. On account of the foregoing defendant WOODCREST NURSING HOME is indebted to plaintiff in the amount of $75,862.20 plus interest.

COUNT II--CAUSE OF ACTION AGAINST DEFENDANT DONALD D. GOLDBERG

12. Plaintiff repeats and realleges each and every allegation in paragraphs "1" through "11" hereof.

13. Defendant DONALD D. GOLDBERG was a general partner of defendant WOODCREST NURSING HOME at the time of the occurrences out of which this action arises and, as such, is personally liable for all debts and other obligations of defendant WOODCREST NURSING HOME to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy same.

14. On account of the foregoing defendant DONALD D. GOLDBERG is liable to plaintiff in the amount of $75,862.20 plus interest to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to the judgment against defendant WOODCREST NURSING HOME.

COUNT III--CAUSE OF ACTION AGAINST DEFENDANT IRWIN M. ROSENTHAL

15. Plaintiff repeats and realleges each and every allegation in paragraphs "1" through "11" hereof.

16. Defendant IRWIN M. ROSENTHAL was a general partner of defendant WOODCREST NURSING HOME at the time of the occurrences out of which this action arises and, as such, is personally liable for all debts and other obligations of defendant WOODCREST NURSING HOME to

the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy same.

17. On account of the foregoing defendant IRWIN M. ROSENTHAL is liable to plaintiff in the amount of $75,862.20 plus interest to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against defendant WOODCREST NURSING HOME.

COUNT IV--CAUSE OF ACTION AGAINST DEFENDANT JACK E. BRONSTON

18. Plaintiff repeats and realleges each and every allegation in paragraphs "1" through "11" hereof.

19. Defendant JACK E. BRONSTON was a general partner of defendant WOODCREST NURSING HOME at the time of the occurrences out of which this action arises and, as such, is personally liable for

all debts and other obligations of extent that the assets of WOODCREST NURSING HOME are insufficient to satisfy same.

20. On account of the foregoing defendant JACK E. BRONSTON is liable to plaintiff in the amount of $75,862.20 plus interest to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against defendant WOODCREST NURSING HOME.

COUNT V--CAUSE OF ACTION AGAINST DEFENDANTs HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of LAWRENCE PEIREZ

21. Plaintiff repeats and realleges each and every allegation in paragraphs "1" through "11" hereof.

22. LAWRENCE PEIREZ was a general partner of defendant WOODCREST NURSING

HOME at the time of the occurrences out of which this action arises and, as such, is personally liable for all debts and other obligations of defendant WOODCREST NURSING HOME to the extent that the assets of WOODCREST NURSING HOME are insufficient to satisfy same.

23. Defendants HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of LAWRENCE PEIREZ, are responsible for paying the debts of LAWRENCE PEIREZ.

24. On account of the foregoing defendants HILDA PEIREZ, WILLIAM PEIREZ, and BARBARA KIRBY, as Executors of the Estate of LAWRENCE PEIREZ, are liable to plaintiff in the amount of $75,862.20 plus interest to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the

judgment against defendant WOODCREST NURSING HOME.

COUNT VI--FIRST CAUSE OF ACTION
AGAINST DEFENDANT GERALD SCHWARTZ

25. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "11" hereof.

26. Defendant GERALD SCHWARTZ was a general partner of defendant WOODCREST NURSING HOME at the time of the occurrences out of which this action arises and, as such, is personally liable for all debts and other obligations of defendant WOODCREST NURSING HOME to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy same.

27. On account of the foregoing, defendant GERALD SCHWARTZ is liable to plaintiff in the amount of $75,862.20

plus interest to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against defendant WOODCREST NURSING HOME.

COUNT VII-SECOND CAUSE OF ACTION AGAINST DEFENDANT GERALD SCHWARTZ

28. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "8" hereof.

29. On or about April 19, 1969, defendant GERALD SCHWARTZ purchased the partnership interests of the other general partners of defendant WOODCREST NURSING HOME and thereafter continued to operate the nursing home facility known as "WOODCREST NURSING HOME" as a sole proprietorship.

30. The current financing indebtedness incurred by WOODCREST NURSING HOME while operated by the defendant WOODCREST NURSING HOME was assumed or otherwise taken over by defendant GERALD SCHWARTZ in connection with his purchase of the interests of the other partners of WOODCREST NURSING HOME and his continuation of the operations of the nursing home.

31. The net amount of outstanding current financing indebtedness assumed or otherwise taken over by defendant GERALD SCHWARTZ and not repaid or offset is $75,862.20 plus accrued interest.

32. On account of the foregoing defendant GERALD SCHWARTZ is indebted to plaintiff in the amount of $75,862.20 plus accrued interest.

33. Demand has been made upon defendant GERALD SCHWARTZ for payment of said $75,862.20 but said defendant has refused or failed to pay same.

COUNT VIII--THIRD CAUSE OF ACTION AGAINST DEFENDANT GERALD SCHWARTZ

34. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "8" and paragraph "29" hereof.

35. In connection with the purchase described in paragraph "29" hereof, defendant GERALD SCHWARTZ agreed, as the liquidator of WOODCREST NURSING HOME, to assemble and collect all assets of defendant WOODCREST NURSING HOME, and to cause all payables of said general partnership to be paid and to apply thereto all receivables due and owing the general partnership.

36. Said agreement insures to the benefit of plaintiff in that plaintiff was a creditor of defendant WOODCREST NURSING HOME and the holder of a payable in the form of the outstanding current financing indebtedness.

37. Plaintiff is a third party beneficiary of defendant GERALD SCHWARTZ's agreement to collect the assets and claims of defendant WOODCREST NURSING HOME and cause the payables of defendant WOODCREST NURSING HOME to be paid.

38. The net amount of current financing indebtedness presently payable by defendant WOODCREST NURSING HOME is $75,862.20 plus accrued interest.

39. Demand has been made upon defendant GERALD SCHWARTZ for payment of said indebtedness but said defendant has

failed or refused to pay the same.

40. On account of the foregoing defendant GERALD SCHWARTZ is indebted to plaintiff in the amount of $75,862.20 plus accrued interest.

COUNT IX--FOURTH CAUSE OF ACTION AGAINST GERALD SCHWARTZ

41. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "8" and paragraph "29" hereof.

42. Individually and in his capacity as liquidator of defendant WOODCRST NURSING HOME, defendant GERALD SCHWARTZ collected various funds to be applied to the debts and losses of WOODCREST NURSING HOME.

43. Defendant GERALD SCHWARTZ failed or refused to apply the aforesaid funds to the debt owing by WOODCREST NURSING HOME to plaintiff.

44. Defendant GERALD SCHWARTZ, as the holder of funds to be applied to the debts of WOODCREST NURSING HOME, occupied a fiduciary relationship with request to plaintiff.

45. Defendant GERALD SCHWARTZ failed to apply the assets of WOODCREST NURSING HOME to the debt owed by WOODCREST NURSING HOME to plaintiff constitutes a violation of said defendant's fiduciary obligation toward plaintiff.

46. On account of the foregoing defendant GERALD SCHWARTZ is indebted to plaintiff in the amount of $75,862.20 plus accrued interest.

COUNT X--FIFTH CAUSE OF ACTION
AGAINST DEFENDANT GERALD SCHWARTZ

47. Plaintiff repeats and realleges each allegation contained in paragraphs "1" through "3" hereof.

48. During the period from January 1, 1970 to June 15, 1970 defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home participated in the Medicare Program as a provider of services thereunder.

49. During the period in which defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home, participated in the Medicare Program and furnished services to Medicare Program beneficiaries, said defendant was entitled to reimbursement for the reasonable cost of such under 42 U.S.C. §1395f(b).

50. During the period referred to in paragraph 28, the Travelers Insurance Company, hereinafter referred to as the "Intermediary", on behalf of plaintiff and pursuant to a contract with the Secretary of Health, Education and Welfare

as authorized under 42 U.S.C. §1395h and 20 C.F.R. §§405.405 and 405.454, made interim payments to defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home not less than monthly in amounts based on the estimated (unaudited) cost of covered services furnished to Medicare Program beneficiaries by said defendant (said payments being hereafter referred to as "Interim Payments").

51. Under 20 C.F.R. §405.406, promulgated by the Secretary of Health, Education and Welfare pursuant to 42 U.S.C. §§1395g and 1395hh, defendant GERALD SCHWARTZ d/b/a/ Woodcrest Nursing Home was required to furnish cost reports to the Intermediary on at least an annual basis in order that the Intermediary might determine how much was properly due said defendant under the Medicare Program.

52. Under 20 C.F.R. §§404.405 and 405.454, promulgated by the Secretary of Health, Education and Welfare pursuant to 42 U.S.C. §1395hh, the Intermediary was required to make a final retroactive adjustment at the end of each cost reporting period, upon an audit of said defendant's cost report for such period, to bring the Interim Payments into conformity with the actual reimbursable amounts payable to defendant for covered services furnished to Medicare Program beneficiaries during the reporting period.

53. For the period from January 1, 1970 to June 15, 1970, the Intermediary made Interim Payments to defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home, in the aggregate amount of $367,828.00.

54. Defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home, submitted a cost report to the Intermediary for the period from January 1, 1970 to June 15, 1970.

55. After reviewing the books and records of defendant to verify the costs reflected in the cost report for the period from January 1, 1970 to June 15, 1970, the Intermediary made a final determination that the reasonable cost of covered services furnished to Medicare Program beneficiaries by said defendant during the period from January 1, 1970 to June 15, 1970 was $264,336.00 and that said defendant had been overpaid in the amount of $103,492.00.

56. The net aggregate overpayment of $103,492.00 was subsequently reduced by offsets and withholdings in the aggregate amount of $45,159.88.

57. On account of the foregoing defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home is indebted to plaintiff in the amount of $58,332.12 plus accrued interest.

WHEREOF, plaintiff UNITED STATES OF AMERICA demands:

1. Judgment for the sum of $75,862.20 plus interest thereon accruing from the date of first demand to the date of judgment, plus interest on the judgment from the date of entry and plaintiff's costs:

(a) On Count I against defendant WOODCREST NURSING HOME.

(b) On Count II against defendant DONALD D. GOLDBERG to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against WOODCREST NURSING HOME.

(c) On Count III against defendant IRWIN M. ROSENTHAL to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against WOODCREST NURSING HOME.

(d) On Count IV against defendant JACK E. BRONSTON to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against WOODCREST NURSING HOME.

(e) On Count V against defendants HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of LAWRENCE PEIREZ, to the extent that the assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against WOODCREST NURSING HOME.

(f) On Count VI against defendant GERALD SCHWARTZ to the extent that the

assets of defendant WOODCREST NURSING HOME are insufficient to satisfy the judgment against defendant WOODCREST NURSING HOME.

(g) On Counts VII, VIII and IX against defendant GERALD SCHWARTZ.

2. Judgment on the Count X against defendant GERALD SCHWARTZ d/b/a Woodcrest Nursing Home for the sum of $58,332.12 plus interest thereon from the date of first demand to the date of judgment, together with interest on the judgment from the date of entry and plaintiff's costs.

Dated: Brooklyn, New York
January 17, 1977

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By:
/s/
DAVID W. McMORROW
Assistant United States Attorney

Civil Action No. 76 C 1101
ANSWER, COUNTERCLAIM
AND CROSS-CLAIMS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,
Plaintiff, :
-against-
WOODCREST NURSING HOME, a partnership; GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home; DONALD D. GOLDBERG; IRWIN M. ROSENTHAL; JACK E. BRONSTON; and HILDA PEIREZ, WILLIAM PEIREZ, and BARBARA KIRBY, as Executors of the Estate of Lawrence Peirez, :
Defendants. :

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Defendants, Woodcrest Nursing Home and Gerald Schwartz, for their answer to the amended complaint ("the complaint") herein:

Count I (Woodcrest Nursing Home)

1. Defendant Woodcrest Nursing Home denies each and every allegation contained in paragraphs 9 and 11 of the complaint.

Count II (Gerald Schwartz)

2. Defendant Gerald Schwartz denies each and every allegation contained in paragraphs 26 and 27 of the complaint, except admits that he was a general partner of defendant Woodcrest Nursing Home at the time of the occurrences out of which this action arises.

Count VII (Gerald Schwartz)

3. Defendant Gerald Schwartz denies each and every allegation contained in paragraphs 30, 31, and 32 of the complaint.

Count VIII (Gerald Schwartz)

4. Defendant Gerald Schwartz denies each and every allegation contained in paragraphs 35, 36, 37, 38, and 40 of the complaint.

Count IX (Gerald Schwartz)

5. Defendant Gerald Schwartz

denies each and every allegation contained in paragraphs 43, 44, 45, and 46 of the complaint, except admits that he refused to apply to plaintiff funds collected by him.

Count X (Gerald Schwartz)

6. Defendant denies each and every allegation contained in paragraph 55 of the complaint, except admits that the Intermediary alone made a determination that the reasonable cost of covered services furnished by said defendant during the period from January 1, 1970 to June 15, 1970 was $264,336.00.

7. Defendant denies each and every allegation contained in paragraphs 56 and 57 of the complaint, except admits plaintiff has given him credit against plaintiff's claim in the aggregate amount of $45,159.88.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE AGAINST ALL OF THE CAUSES OF ACTION ALLEGED AGAINST GERALD SCHWARTZ, SAID DEFENDANT ALLEGES:

8. Any claimed overpayment to such defendant was made to him as a provider of services under the Medicare Program who was without fault, and recovery by plaintiff of the same would defeat the purposes of Subchapter II and Subchapter XVIII of Chapter 7 of Title 42, United States Code.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE AGAINST ALL OF THE CAUSES OF ACTION ALLEGED AGAINST GERALD SCHWARTZ, SAID DEFENDANT ALLEGES:

9. The determination that any payment to the defendant alleged in the complaint was incorrect was not made by the Secretary of Health, Education and Welfare.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE AGAINST ALL OF THE CAUSES OF ACTION ALLEGED AGAINST GERALD SCHWARTZ, SAID DEFENDANT ALLEGES:

10. The determinations that payments to the defendant alleged in the complaint were incorrect were made in all cases subsequent to the third year following the year in which notice of payment was sent.

AS AND FOR A FIRST CROSS-CLAIM AGAINST THE DEFENDANT DONALD D. GOLDBERG, GERALD SCHWARTZ ALLEGES:

11. During the period from August 30, 1968 to April 19, 1969, at the time the alleged financing payments from the Intermediary were received by the Woodcrest Nursing Home (general partnership), in the sum of $105,116.00, the defendant Donald D. Goldberg was the managing partner of said general partnership.

12. By virtue of the agreement among the partners, the said defendant Goldberg was forbidden to incur an obligation for said partnership in excess of $5,000.00, unless the same was approved by a majority in number of the partners and signed by at least two of them.

13. The obligation to repay said sum of $105,116.00 was incurred for the said Woodcrest Nursing Home by the defendant Goldberg in violation of the said agreement among the parties without approval of a majority of them and without the signatures of at least two of them.

14. By reason of the foregoing, defendant Schwartz was required to and did pay to plaintiff $29,253,80, of which $24,253.80 was incurred by defendant Goldberg for the said partnership in

violation of the partnership agreement as aforesaid.

15. If the defendant Schwartz is held liable to plaintiff for the sum of $75,862.20, defendant Goldberg will be liable to defendant Schwartz in that sum plus the sum of $24,253.80 set forth in paragraph 14 hereof.

AS AND FOR A SECOND CROSS-CLAIM AGAINST THE DEFENDANT DONALD D. GOLDBERG, GERALD SCHWARTZ ALLEGES:

16. During the period from August 30, 1968 to April 19, 1969, at the time the alleged financing payments from the Intermediary were received by the Woodcrest Nursing Home, general partnership, in the sum of $105,116.00, the defendant Donald D. Goldberg had a 50% interest in such partnership and was liable for 50% of its liabilities.

17. Defendant Schwartz paid to plaintiff the sum of $29,253.80 on account of the aforesaid claimed liability of $105,116.00, and if he is held liable to plaintiff for the sum of $75,862.20, defendant Goldberg will be liable to defendant Schwartz for 50% of $105,116.00 or $52,558.00.

AS AND FOR A FIRST COUNTERCLAIM AGAINST THE PLAINTIFF, DEFENDANT GERALD SCHWARTZ, INDIVIDUALLY AND DOING BUSINESS AS WOODCREST NURSING HOME ALLEGES:

18. This claims arises under the Social Security Act, 42 U.S.C. §1395 et seq.; the amount in controversy exceeds $10,000.00, and the Court has jurisdiction under 28 U.S.C. §1331.

19. Woodcrest Nursing Home ("Woodcrest") was certified as qualified to provide Medicare services under Title XVIII of the Medicare Act for periods

inclusive of the period from September 1, 1968 to and including December 31, 1968 and from January 1, 1969, to and including April 18, 1969, both herein called the "Periods".

20. During the Periods Woodcrest provided such Medicare services and among such services were services, facilities or supplies purchased from an organization known as Orthopedic Rehabilitation Institute ("ORI"), at a cost to Woodcrest of $78,273.00 for the period September 1, 1968 to and including December 31, 1968, and $93,169.00 for the period from January 1, 1969 to and including April 18, 1969.

21. During the Periods, ORI was a bona fide organization separate from Woodcrest; a substantial part of ORI's business activity of the type carried on

with Woodcrest was transacted with other organizations not related to Woodcrest and ORI by common ownership or control and there was an open, competitive market for the type of services, facilities and supplies furnished by ORI to Woodcrest.

22. During the Periods, the services, facilities or supplies obtained by Woodcrest from ORI were those which commonly were obtained by institutions such as Woodcrest from other organizations and were not a basic element of patient care ordinarily furnished directly to patients by such institutions as Woodcrest.

23. The charges for the services, facilities or supplies made by ORI to Woodcrest were and are in line with the charges for such services, facilities or

supplies in the open market and no more than the charges made under comparable circumstances to others by ORI for such services, facilities or supplies.

24. By reason of the foregoing, and the federal statutes and regulations in such case made and provided, the defendant Woodcrest was entitled to receive reimbursement from the plaintiff for the aforesaid costs to Woodcrest of the aforesaid charges, in the sum of $171,442.

25. Heretofore and on or about May 5, 1977, the plaintiff, acting through its intermediary, The Travelers Insurance Company, arbitrarily and capriciously determined that Woodcrest was not entitled to such reimbursement.

26. By reason of all the foregoing, plaintiff is indebted to Gerald

Schwartz, doing business as Woodcrest Nursing Home in the sum of $171,442.00 with interest.

AS AND FOR A THIRD CROSS-CLAIM AGAINST THE DEFENDANT DONALD D. GOLDBERG, DEFENDANT GERALD SCHWARTZ, INDIVIDUALLY AND DOING BUSINESS AS WOODCREST NURSING HOME ALLEGES:

27. Defendants repeat each and every allegation contained in paragraphs 18 through 26 hereof with the same force and effect as if herein again at length set forth.

28. On or about November 29, 1968, Woodcrest and Donald D. Goldberg entered into the following agreement in writing:

"In the event that the United States of America or its appropriate governmental sub-division, or any appropriate insurance carrier or fiscal agent of agency, under and pursuant to the Medicare of similar successor program, determines at any time, up to and including the annual audit

> for any year, but not thereafter, that any charge or charges made by the Orthopedic and Rehabilitation Institute, during such year to the Woodcrest Nursing Home, for care rendered to patients of the nursing home are by virtue of incorrect or inappropriate rate, not reimbursable in part, then such amount or amounts so determined to be excessive of non-reimbursable, will be borne by the Orthopedic and Rehabilitation Institute and repaid to the General Partnership within thirty (30) days after such determination by such governmental or other Agency."

29. In the event the Court determines that the sums claimed by Woodcrest for the charges made by and paid to ORI are not reimbursable to Woodcrest by the plaintiff or excessive, then Donald D. Goldberg is liable to Woodcrest for such amount as the Court determines is not reimbursable by the plaintiff to Woodcrest or excessive.

WHEREFORE, defendants Gerald Schwartz and Woodcrest Nursing Home demand judgment:

(a) Dismissing the complaint;

(b) Against the defendant Donald D. Goldberg for all sums that may be adjudged against Woodcrest and Schwartz in favor of the plaintiff.

(c) Against the plaintiff in the sum of $171,442.00, or, in the alternative, against the defendant Donald D. Goldberg in the sum of $171,442.00;

(d) Adjusting the claims amount the defendants; and

(e) Granting such other, further or different relief as to the Court may seem just and proper in the premises.

Dated: New York, New York

June 23, 1977

DUBLIRER, HAYDON, STRACI
Attorneys for Defendants
Gerald Schwartz and
Woodcrest Nursing Home

BY: _____
Charles Haydon, Partner
Office & P.O. Address
67 Wall Street
New York, New York 10005
(212) 943-0880

Civil Action
No. 76 C 1101

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

WOODCREST NURSING HOME, a partnership; GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home; DONALD D. GOLDBERG; IRWIN M. ROSENTHAL; JACK E. BRONSTON; and HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of Lawrence Peirez,

Defendants.
----------x

Defendant, DONALD D. GOLDBERG, by his attorney, H. STUART KLOPPER, answers the amended complaint as follows:

1. Denies knowledge of information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, 3, 9, 10 and 11 of the amended complaint.

2. Denies each and every allegation contained in Paragraphs 13 and 14 of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT, DONALD D. GOLDBERG, ALLEGES:

3. The complaint in this action against defendant, DONALD D. GOLDBERG, was not filed within six years after the right of action accrued against defendant, DONALD D. GOLDBERG, and is therefore barred by the statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT, DONALD D. GOLDBERG, ALLEGES:

4. As set forth in Paragraph 29 of the amended complaint, on or about April 19, 1969, defendant, GERALD SCHWARTZ, by agreement entered into on or about said date, purchased the partnership interests of defendants, DONALD D. GOLDBERG,

JACK E. BRONSTON, IRWIN M. ROSENTHAL and LAWRENCE PEIREZ (Lawrence Peirez having since died and his Estate represented by HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY as Executors are hereinabove named as defendants). Thereafter, said defendant, GERALD SHCWARTZ, continued to operate the nursing home facility known as Woodcrest Nursing Home as a sole proprietorship.

5. The current financing indebtedness described in the complaint and alleged to have been incurred by Woodcrest Nursing Home was assumed and taken over by defendant, GERALD SCHWARTZ, in connection with his purchase of the interests of the other partners of Woodcrest Nursing Home, including the interest of defendant, DONALD D. GOLDBERG, and his continuation of the operations

of the nursing home, and plaintiff by agreement, express or implied, accepted the said GERALD SCHWARTZ as the sole obligor and person liable for the said current financing described in the complaint in the place and stead of the retiring partners hereinabove named as defendants, and did thereby release said defendants, including defendant, DONALD D. GOLDBERG, from all liability and obligations in connection with the said current financing, and the said GERALD SCHWARTZ agreed to be substituted as the person liable for said current financing and to perform the conditions thereof in the place and stead of defendant, DONALD D. GOLDBERG, and the other defendants above named other than GERALD SCHWARTZ.

AS AND FOR A FIRST CROSSCLAIM AGAINST DEFENDANT, GERALD SCHWARTZ, DEFENDANT, DONALD D. GOLDBERG, ALLEGES:

6. On or about April 19, 1969, defendant, GERALD SCHWARTZ, by agreement entered into on or about said date, purchased the partnership interests of defendants, DONALD D. GOLDBERG, JACK E. BRONSTON, IRWIN M. ROSENTHAL and LAWRENCE PEIREZ (Lawrence Peirez having since died and his Estate represented by HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY as Executors are hereinabove named as defendants). Thereafter, said defendant, GERALD SCHWARTZ, continued to operate the nursing home facility known as Woodcrest Nursing Home as a sole proprietorship.

7. The current financing indebtedness described in the complaint and alleged to have been incurred by

Woodcrest Nursing Home was assumed and taken over by defendant, GERALD SCHWARTZ, in connection with his purchase of the interests of the other partners of Woodcrest Nursing Home, including the interest of defendant, DONALD D. GOLDBERG, and his continuation of the operations of the nursing home, and plaintiff by agreement, express or implied, accepted the said GERALD SCHWARTZ as the sole obligor and person liable for the said current financing described in the complaint in the place and stead of the retiring partners hereinabove named as defendants, and did thereby release said defendants, including defendant, DONALD D. GOLDBERG, from all liability and obligations in connection with the said current financing, and the said GERALD SCHWARTZ agreed to be substituted as the person

liable for said current financing and to perform the conditions thereof in the place and stead of defendant, DONALD D. GOLDBERG, and the other defendants above named other than GERALD SCHWARTZ.

8. If the defendant, DONALD D. GOLDBERG, is held liable to the plaintiff for the sum of $75,862.20, as demanded in the complaint, or any part thereof, then defendant, GERALD SCHWARTZ, will be liable to defendant, DONALD D. GOLDBERG, in any such sum for which defendant, DONALD D. GOLDBERG, may be held liable to the plaintiff.

AS AND FOR A SECOND CROSSCLAIM AGAINST DEFENDANTS, GERALD SCHWARTZ, JACK E. BRONSTON, IRWIN M. ROSENTHAL and HILDA PEIREZ, WILLIAM PEIREZ AND BARBARA KIRBY, AS EXECUTORS OF THE ESTATE OF LAWRENCE PEIREZ, DEFENDANT, DONALD D. GOLDBERG, ALLEGES:

9. During the period from August 30, 1968 to April 19, 1969, at the time of the occurrences out of which plaintiff's action allegedly arose, defendants, GERALD SCHWARTZ, JACK E. BRONSTON, IRWIN M. ROSENTHAL and defendants, HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY's Testator, LAWRENCE PEIREZ, were general partners of the defendant, WOODCREST NURSING HOME.

10. By reason of the foregoing, defendants, GERALD SCHWARTZ, JACK E. BRONSTON, IRWIN M. ROSENTHAL and HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of Lawrence Peirez, are liable to defendant, DONALD D. GOLDBERG, for any sum that said defendant, DONALD D. GOLDBERG, may be liable to plaintiff in proportion to their respective interests as general partners as aforesaid.

ANSWERING THE FIRST, SECOND AND THIRD CROSSCLAIMS AGAINST DONALD D. GOLDBERG MADE BY GERALD SCHWARTZ, DEFENDANT, DONALD D. GOLDBERG:

11. Denies each and every allegation contained in the answer of GERALD SCHWARTZ designated as Paragraphs 12, 13, 14, 15, 17 and 29.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO THE FIRST, SECOND AND THIRD CROSSCLAIMS OF GERALD SCHWARTZ AGAINST DONALD D. GOLDBERG, DEFENDANT, DONALD D. GOLDBERG ALLEGES:

12. That heretofore, the defendants, GERALD SCHWARTZ and DONALD D. GOLDBERG, as general partners of Woodcrest Nursing Home, had an accounting of their respective interests in the Woodcrest Nursing Home and a balance was struck, and a judgment in accordance therewith was duly rendered in favor of defendant, DONALD D. GOLDBERG, and against defendant, GERALD SCHWARTZ, and docketed in

the office of the Clerk of the Supreme Court of the State of New York, County of Queens, on or about November 25, 1975, which judgment is res adjudicata as to all claims of the defendant, GERALD SCHWARTZ, arising out of the partnership relationship between said GERALD SCHWARTZ and DONALD D. GOLDBERG, as general partners of Woodcrest Nursing Home.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO THE FIRST CROSSCLAIM OF DEFENDANT, GERALD SCHWARTZ, DEFENDANT, DONALD D. GOLDBERG, ALLEGES

13. The agreement amount the partners described in Paragraph 12 of defendant, GERALD SCHWARTZ's answer and crossclaim did not prohibit the acceptance of advance payments on behalf of the partnership.

14. In any case, the partnership accepted and used the advance payments from the United States of America and cannot now be heard to deny the nursing home's receipt and acceptance of them nor the right of the plaintiff to make the advance payments.

AS A THIRD AFFIRMATIVE DEFENSE TO THE THIRD CROSSCLAIM OF DEFENDANT, GERALD SCHWARTZ, DEFENDANT, DONALD D. GOLDBERG, ALLEGES:

15. The agreement referred to in Paragraph 28 of the third crossclaim of defendant, GERALD SCHWARTZ, against defendant, DONALD D. GOLDBERG, has in the accounting proceeding aforementioned been interpreted to mean that any liability by defendant, DONALD D. GOLDBERG, shall be predicated upon a determination that the charges by defendant, DONALD D. GOLDBERG, and paid by Woodcrest

Nursing Home to defendant, DONALD D. GOLDBERG, should not be reimbursable *** by virtue of incorrect or inappropriate rate only.

AMERICAN ARBITRATION ASSOCIATION,
Administrator

Award of Arbitrators

Commercial Arbitration Tribunal

In the Matter of the Arbitration)
between)
)
DONALD D. GOLDBERG)
)
AND)
)
GERALD SCHWARTZ, INDIVIDUALLY AND AS)
GENERAL PARTNER OF WOODCREST NURSING)
HOME AND CLIFFSIDE NURSING HOME)
)

Case number: 1310-0438-71

WE, THE UNDERSIGNED ARIBTRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 15, 1968, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having consented to the inclusion in this proceeding of issues related to CLIFFSIDE NURSING HOME, AWARD, as follows:

1. GERALD SCHWARTZ, INDIVIDUALLY AND AS GENERAL PARTNER OF WOODCREST NURSING HOME AND CLIFFSIDE NURSING HOME, hereinafter referred to as RESPONDENT, shall pay to DONALD D. GOLDBERG, herinafter referred to as CLAIMANT, the sum of THREE HUNDRED SEVENTY-SEVEN THOUSAND EIGHT HUNDRED FORTY-EIGHT DOLLARS AND SEVEN CENTS ($377,848.07), together with interest thereon at the rate of 6% per annum from April 15, 1971 to the date this AWARD is transmitted to the Parties by the American Arbitration Association. Said amount was arrived at as follows:

A. CLAIMANT'S share of the proceeds from the sale of Woodcrest

Nursing Home by the real estate partnership owning said home	$201,125.00
B. CLAIMANT'S 50% interest in the profits from the operation of Woodcrest Nursing Home Operating Partnership from September 1, 1968 to April 19, 1969	82,167.50
C. In complete requital of CLAIMANT'S interest in the Cliffside Nursing Home Limited Partnership	94,555.57
Total due CLAIMANT	$377,848.07

2. The counterclaim of RESPONDENT against CLAIMANT is hereby denied.
3. The agreed to compensation of the Arbitrators totalling ELEVEN

THOUSAND FOUR HUNDRED DOLLARS ($11,400.00) shall be borne equally by the Parties. Therefore, CLAIMANT shall pay to the American Arbitration Association the sum of ONE THOUSAND EIGHT HUNDRED DOLLARS ($1,800.00), and RESPONDENT shall pay to the American Arbitration Association the sum of THREE HUNDRED DOLLARS ($300.00) for the portions of their respective shares of said compensation still due.

4. The administrative fees and expenses of the American Arbitration Association totalling FIVE THOUSAND EIGHT HUNDRED SIXTY-ONE DOLLARS AND THIRTY-NINE CENTS ($5,861.39) shall be borne by RESPONDENT. Therefore, RESPONDENT shall also pay to CLAIMANT the sum

of TWO THOUSAND EIGHT HUNDRED SIXTY-THREE DOLLARS AND SEVENTY CENTS ($2,863.70) for that portion of said fees and expenses previously advanced by CLAIMANT to the American Arbitration Association the sum of TWO THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS AND NINETY-SEVEN CENTS ($2,375.97).

5. This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration.

DATED: August 1, 1985

/s/Arthur B.Hooker
ARTHUR B. HOOKER

/s/Sheldon F. Kurtz
SHELDON F. KURTZ

/s/Edward Roberts
EDWARD ROBERTS, III

State of: New York)
)ss.:
County of: New York)

On this 6th day of Auqust, 1985, before me personally came and appeared ARTHUR B. HOOKER to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Republic
not legible

State of: Iowa)
)ss.:
County of Johnson)

On this 5 day of Aug., 1985, before me presonally came and appeared SHELDON F. KURTZ to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/James E. Rycks

State of: New York)
)ss.:
County of: New York)

On this 1st day of August 1985, before me personally came and appeared EDWARD ROBERTS, III to me known and known to me to be the individual described in and who executed the

foregoing instrument and he acknowledged to me that he executed the same.

/s/Bruce O. Fitzgerald
Notary Public, State of New York
No. 60-6316475
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1974

AMERICAN ARBITRATION ASSOCIATION,
Administrator

OPINION OF ARBITRATORS

Commercial Arbitration Tribunal

In the Matter of the Arbitration between

DONALD D. GOLDBERG

AND

GERALD SCHWARTZ, INDIVIDUALLY AND AS GENERAL PARTNER OF WOODCREST NURSING HOME AND CLIFFSIDE NURSING HOME

Case Number: 1310-0438-71

Nothing in this AWARD shall preclude Gerald Schwartz from making a claim on the memorandum dated November 29, 1968 amending the General Partnership Agreement for the operation of Woodcrest, but only upon the final determination of a court of competent jurisdiction that charges made by the Orthopedic and Rehabilitation Institute ("ORI") and paid by Woodcrest to ORI

should not be reimbursed by the appropriate agency by virtue of incorrect or inappropriate rate. Dr. Goldberg is directed to cooperate fully in the process of effecting such determination.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Queens, at the Queens General Coutthouse, 88-11 Sutphin Boulevard, Jamaica, New York, on the 25th day of November, 1985.

Index No.
9632/75

JUDGMENT CONFIRMING ARBITRATION AWARD

P R E S E N T:

HON. ALFRED D. LERNER,

Justice.

----------x

In the Matter of the Arbitration of Certain Controversies between

DONALD D. GOLDBERG,

Petitioner,

-and-

GERALD SCHWARTZ, individually and as General Partner of WOODCREST NURSING HOME and CLIFFSIDE NURSING HOME,

Respondent.

----------x

Petitioner, having moved this Court by order to show cause dated August

11th, 1985, for judgment pursuant to CPLR 7510 confirming the award of the arbitrators dated August 1st, 1985, and respondent, by cross motion, having moved for an order pursuant to CPLR 7511 for an order vacating the said award, and the said motion and cross motion having duly and regularly come on to be heard before me on the 9th day of September, 1985, now, upon reading and filing the order to show cause dated August 11th, 1975, the petition of Donald D. Goldberg verified on the 11th day of August, 1975, the award of the arbitrators dated August 1st, 1985, the affidavit of H. Stuart Klopper sworn to the 25th day of August, 1975, and exhibits numbered "1" through "12", and the letters of H. Stuart Klopper to the Court dated September 29th, 1975 and

October 10th, 1975 with proof of service thereof submitted in support of the motion and in opposition to respondent's cross motion, and upon reading the notice of cross motion dated August 14th, 1975, the affidavit of Gerald Schwartz respondent, verified the 14th day of August, 1975 and exhibits "A" through "D", the affidavit of Harold Dublirer verified the 4th day of September, 1975, and the letter of Harold Dublirer to the Court dated October 8th, 1975 submitted in support of the cross motion and in opposition to petitioner's motion to confirm, and after hearing H. Stuart Klopper, attorney for petitioner, in support of the motion to confirm and in opposition to the cross motion to vacate, and Harold Dublierer, attorney for

respondent in opposition to the motion to confirm and in support of the cross motion to vacate, and due deliberation having been had thereon, and upon the decision of this Court dated November 12th, 1975,

NOW, on motion of H. STUART KLOPPER, attorney for petitioner, it is

ORDERED AND ADJUDGED, that the unanimous award of Arthur B. Hooker, Sheldon F. Kurtz and Edward Roberts III, the arbitrators in this proceeding, dated the 1st day of August, 1975, in which, with the consent of the parties to the inclusion in the proceeding of issues related to Cliffside Nursing Home, they determined and awarded:

1. GERALD SCHWARTZ, INDIVIDUALLY AND AS GENERAL PARTNER OF WOODCREST NURSING HOME AND CLIFFSIDE NURSING

HOME, hereinafter referred to as RESPONDENT, shall pay to DONALD D. GOLDBERG, hereinafter referred to as CLAIMANT, the sum of THREE HUNDRED SEVENTY-SEVEN THOUSAND EIGHT HUNDRED FORTY-EIGHT DOLLARS AND SEVEN CENTS ($377,848.07), together with interest thereon at the rate of 6% per annum from April 15, 1971 to the date this AWARD is transmitted to the Parties by the American Arbitration Association. Said amount was arrived at as follows:

A. CLAIMANT's share of the proceeds from the sale of Woodcrest Nursing Home by the real estate partnership owning said home	$201,125.00

B. CLAIMANT'S 50% interest in the profits from the operation of Woodcrest Nursing Home Operating Partnership from September 1, 1968 to April 19, 1969	82,167.50
C. In complete requital of CLAIMANT'S interest in the Cliffside Nursing Home Limited Partnership	94,555.57
Total due CLAIMANT	$377,848.07

2. The counterclaim of RESPONDENT against CLAIMANT is hereby denied.

3. The agreed to compensation of the Arbitrators totalling ELEVEN THOUSAND FOUR HUNDRED DOLLARS ($11,400.00) shall be borne equally by the Parties. Therefore, CLAIMANT shall pay to the American

Arbitration Association the sum of ONE THOUSAND EIGHT HUNDRED DOLLARS ($1,800.00), and RESPONDENT shall pay to the American Arbitration Association the sum of THREE HUNDRED DOLLARS ($300.00) for the portions of their respective shares of said compensation still due.

4. The administrative fees and expenses of the American Arbitrtion Association totalling FIVE THOUSAND EIGHT HUNDRED SIXTY-ONE DOLLARS AND THIRTY-NINE CENTS ($5,861.39) shall be borne by RESPONDENT. Therefore, RESPONDENT shall also pay to CLAIMANT the sum of TWO THOUSAND EIGHT HUNDRED SIXTY-THREE DOLLARS AND SEVENTY CENTS ($2,863.70) for that portion of said fees and expenses previously advanced by CLAIMANT to

the Association, and RESPONDENT shall pay to the American Arbitration Association the sum of TWO THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS AND NINETY-SEVEN CENTS ($2,375.97) for that portion of said fees and expenses still due the Association.

5. This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration.

be and the same hereby is in all respects confirmed, and it is further

ORDERED that the cross motion to vacate said award be the same hereby is in all respects denied, and it is further

ORDERED AND ADJUDGED, the compensation of the arbitrators totalling $11,400.00 as agreed shall be borne

equally by the parties; petitioner shall pay to the American Arbitration Association the sum of $1,800.00 and respondent shall pay to the American Arbitration Association the sum of $300.00 for the portions of their respective shares of said compensation still due, and it is further

ORDERED AND ADJUDGED, the administrative fees and expenses of the American Arbitrtion Association totalling $5,861.39 shall be borne by respondent, and respondent shall also pay to petitioner the sum of $2,863.70 for that portion of said fees and expenses previously advanced by petitioner to the Association, and respondent shall further pay to the American Arbitration Association the sum of $2,375.97 for that portion of said fees and expense

still due the Association, and it is further

ORDERED AND ADJUDGED, that petitioner Donald D. Goldberg, residing at 6 Edgewood Lane, Roslyn, New York, recover of respondent Gerald Schwartz, individually and as General Partner of Woodcrest Nursing Home and Cliffside Nursing Home, residing at 5005 Collins Avenue, Miami Beach, Florida, the sum of $377,848.07 together with interest thereon at the rate of 6% per annum from April 15th, 1971 to August 1st, 1975, the date of the award, totalling the sum of $475,115.48, together with interest thereon from the date of the award to the date hereof at 6% per annum in the sum of $7,080.77, amounting in all to the sum of $482,196.25, together with disbursements as awarded in the sum of

$2,863.70, making in all the sum of $485,059.95, and that petitioner Donald D. Goldberg have execution therefor.

ENTER

/s/ A D L
John J. Durante
Clerk

GRANTED
Nov. 25, 1975
John J. Durante
Clerk

Petitioner's Address
Donald D. Goldgerg
6 Edgewood Lane
Roslyn, New York

Respondent's Address
Gerald Schwartz
5005 Collins Avenue
Miami Beach, Florida

JUDGMENT

Index #9632/75

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
----------x

DONALD D. GOLDBERG,

Petitioner,

-against-

GERALD SCHWARTZ, individually and as General Partner of WOODCREST NURSING HOME and CLIFFSIDE NURSING HOME,

Respondent,
----------x

The above named respondent having moved the Court of Appeals of the State of New York for leave to appeal from a judgment confirming the arbitration award, dated November 25, 1975, in favor of Donald D. Goldberg, petitioner, and against Gerald Schwartz, individually and as General Partner of Woodcrest Nursing home and Cliffside Nursing Home,

respondent, and the Court of Appeals of the State of New York, by an Order entered in the Office of the Clerk of the said Court on the 10th day of May, 1977, having denied the motion with $20.00 costs and necessary reproduction disbursements to Donald D. Goldberg, petitioner,

NOW, on motion of H. STUART KLOPPER, attorney for petitioner, it is hereby

ADJUDGED that the judgment confirming the arbitration award, dated November 25, 1975, so appealed from, be and the same hereby is in all things unanimously affirmed, and it is further

ADJUDGED that Donald D. Goldberg petitioner, residing at 6 Edgewood Lane, Roslyn, New York, Nassau County, do recover of respondent, Gerald Schwartz,

individually and as General Partner of Woodcrest Nursing Home and Cliffside Nursing Home, the additional sum of $160.80 costs and disbursements as taxed, making in all the sum of $512,554.63, and that said Donald D. Goldberg, petitioner, have execution therefor.

/s/JOHN J. DURANTE
Clerk

Donald D. Goldberg, Petitioner
6 Edgewood Lane
Roslyn, New York

Gerald Schwartz, Respondent
5005 Collins Avenue
Miami Beach, Florida

FILED AND RECORDED
77 May 24 PM 2:07
County Clerk
Queens County

KOZAK, SCHWARTZ & CO.
Certified Public Accountants

310 Madison Avenue,
New York, N.Y. 10017,
Murray Hill 2-6545

TO : Dr. D. Goldberg

FROM: Samuel M. Schwartz

Re : Goldberg VS Schwartz
Woodcrest Nursing Home

I have reviewed the attached work sheet which was prepared by your staff, and without examining the underlying records or interviewing the person who prepared same, I am submitting my interpretation of the date.

On the front page are columns entitled "amount billed", "amount received", "date received", "difference". In columnar form are listed in chronological order various amounts. The amounts shown in the column "amount billed" represent charges of the Orthopedic

Rehabilitation Institute (ORI) to Woodcrest Nursing Home (Woodcrest) for services rendered to the residents of the nursing home. The amounts shown in the column "amount received" represent the amounts woodcrest paid to ORI on said billings. The column "date received" represents the dates of such payments. The column headed "differences" represents the difference between the amount billed to Woodcrest and the amount received by ORI.

Between September 1968 and January 15, 1969, all billings were paid in full by Medicare and in turn by Woodcrest to ORI. Between January 16, 1969 and March 7, 1969, payments were made by Medicare on account to round amounts which were remitted to ORI in similar amounts.

During the period involved, Medicare reviewed the billings and made various deductions. These deductions are shown on the work sheet under the heading "deducted by Medicare". The amounts so deducted by Medicare, I assume, were based on a pre-audit procedure. The amount so deducted amounted to $27,288. according to the work sheet. The mathematical difference between the amounts billed and amounts received amounted to $24.074. As Medicare by its pre-audit procedures deducted $27,288. from the ORI billings, but had deducted only $24,074. from its cash payments, there was an overpayment by Medicare to Woodcrest, and therefore an overpayment by Woodcrest to ORI of $3,214. ($27,288. minus $24,074.). This overpayment is noted on the work sheet.

On the back page of the work sheet is a listing of "Out Patient Billing". This type of billing represents services performed by ORI for patients of other nursing homes. Based on Medicare regulations, the servicing agency could not bill Medicare directly, but had to bill through a recognized provider. (See forms attached).

The work sheet lists various items - "amount billed" which represents the ORI billing for out-patient services; the next column "amount received from Travelers", represents the amount remitted by Medicare to Woodcrest on account of the ORI billing; the next column "amount paid us", was to represent the amounts remitted by Woodcrest to ORI; the last column "balance due us", represents the amounts received by

Woodcrest and not remitted to ORI.

In columnar form and in chronological sequence are listed the amounts billed by ORI to Woodcrest, and in turn billed by Woodcrest to Medicare. The next column "amount received from Travelers", lists the actual amounts in cash remitted to Woodcrest. The column "amount paid us" is blank, as no amounts were remitted by Woodcrest to ORI for the payments received on behalf of ORI.

Further there is a summary showing: amount received from out-patient billings of against the above amount the work sheet reflects the over-payment between Woodcrest to ORI for the in-house patient billings of the $10,474.78

3,214.00

balance owed to ORI on these transactions as shown by the work sheet is 7,260.78

On this pages is also listed Salaries - "Nursing assistant program" and the amount of $23,800. This amount is shown in the column entitled "amount paid us". However, it was not intended to be applied so such category. This amount represents a billing for a special training program. According to your statement the amount so billed was never remitted by Woodcrest to ORI. Consequently, your staff added the amount of $23,800. to the amount explained above of $7,260.78, to arrive at a grand total of $31,060.78, as being due ORI from Woodcrest.

	Amount Billed	Amount Received	Date Recd.	Difference	
ept. 1968	$7,911.00	$7,911.00	11/6/68		Sep
ct. 1-15	7,101.00	7,101.00	11/15/68		Oct
ct. 16-31	11,385.00	11,385.00	11/15/68		
ov. 1-15	9,972.00	9,972.00	12/6/68		Nov
ov. 16-30	11,988.00	11,988.00	12/27/68		Dec
ec. 1-15	15,219.00	15,219.00	1/2/69		
ec. 16-31	5,400				
	14,677.00	14,677.00	1/10/69		
an. 1-15, 1969	17,568.00	17,568.00	1/23/69	? $62.00	
an. 16-27	19,233.00	10,000.00	2/3/69	9,233.00	
an. 28-Feb. 12	2,1420.00	14,201.00	2/30/69	7,219.00	
eb. 12-26	23,967.00	20,000.00	3/6/67	3,967.00	
eb. 27-Mar 7	11,655.00	8,000.00	3/25/69	3,655.00	
	172,062.00	147,988.00		24,074.00	
educted by Medicare					
968 Billings		$648.00			
/1-1/15		2,268.00			
/16-1/27		2,331.00			
/28-2/11		2,727.00			
/12-2/26		7,659.00			
/27 - 3/7		11,155.00	nothing paid		
			8,505.00 already deducted		
	Bal. not paid	27,288.00			
verpayment by oodcrest	$3,214.00				

illings on Dec. 16-31, 1968 Billing due to corrections on previous illings.

	Amount Billed	Amount Rec From Travelers	Amount Paid us	Co. Inc.	Bal due us
Sept. 1968	$3,020.00	$2,085.00			
Oct. 1968	5,050.00	3,303.58			
	4,200.00	72.00			
Nov. 1968		2,928.00			
Dec. 1968	3,040.00	2,085.60			
		10,474.78			

Amt. Recd from outpatient billings	$10,474.78
Less overpayment	3,214.00
Balance owed on Billings	$7,260.78

Salaries

Nursing Asst Program	$23,800.00	
Total owed		$31,060.78

Civil Action
No. 76 C 1101

AFFIDAVIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

WOODCREST NURSING HOME, a partnership GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home; DONALD D. GOLDBERG: IRWIN M. ROSENTHAL: JACK E. BRONSTON; and HILDA PEIREZ, WILLIAM P. PEIREZ and BARBARA KIRBY, as Executors of the Estate of Lawrence Peirez,

Defendants.
----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

DONALD D. GOLDBERG, being duly sworn deposes and says:

1. I am one of the defendants in the above entitled action and make this affidavit in opposition to the motion of

the plaintiff for summary judgment and in support of a cross motion to dismiss Counts I and II of the complaint on the grounds that:

(a) By Intermediary Letter #301 of the Department of Health, Education and Welfare, Bureau of Health Insurance dated February, 1968 under the terms of the purchase of Woodcrest Nursing Home from the general partnership by the defendant Gerald Schwartz all assets and liabilities were assigned to defendant Gerald Schwartz and current financing payments became his responsibility; and

(b) The amended complaint including Counts I and II

thereof was not filed within six years after the right of action accrued against defendant Woodcrest Nursing Home and Donald D. Goldberg and Count I and II thereof are, therefore, barred by the Statute of Limitations.

(c) In the absence of an allegation that the partnership, Woodcrest Nursing Home, is insolvent or has been adjudicated bankrupt or that the joint or partnership assets are insufficient to pay partnership debts and there appears to be no effective remedy without resort to individual property, no action lies against the partners individually.

Additionally, I make this affidavit in support of a cross motion for summary judgment dismissing the First, Second and Third crossclaims set forth in the answer of the defendants Woodcrest Nursing Home and Gerald Schwartz pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that:

> (d) The issues presented thereby have heretofore been determined in an arbitration proceeding upon which an award was made to me and judgment was entered thereon in the Supreme Court of the State of New York, County of Queens which was affirmed in the Appellate Division of the Supreme Court of the State of New York and leave to appeal

to the Court of Appeals was denied both in the Court of Appeals:

(e) The partnership, Woodcrest Nursing Home, accepted and used the funds received as advance payments from the United States of America and ratified my actions in connection therewith and defendants are thereby estopped to deny Woodcrest Nursing Home's receipt and acceptance thereof or the right of the plaintiff to make the advance payments and have suffered no loss thereby;

(f) In the event that this Court grants the motion of plaintiff to dismiss the

counterclaim urged by the defendants Schwartz and Woodcrest against it as set forth in their answer then, and in that event, the Third cross-claim against me made by the defendant individually and doing business as Woodcrest Nursing Home should likewise be dismissed;

(g) Defendant Schwartz has suffered no damages to sustain its claim for reimbursement based on the indemnity agreement;

(h) Defendant Woodcrest failed to exhaust its administrative remedies and suit on this claim is premature, and finally

(i) Being citizens of the same state, the Court is without jurisdiction to adjudicate the claims of Gerald Schwartz against Donald Goldberg.

MOTION ADDRESSED TO COUNTS I AND II OF THE AMENDED COMPLAINT

Counts I and II of the amended complaint having been dismissed as to the Defendant Goldberg, so much of the moving affidavit addressed to those counts will be omitted from this appendix.

MOTION ADDRESSED TO CROSS-CLAIM BY DEFENDANT SCHWARTZ

12. As a first crossclaim (paragraphs 11 through 15 of his answer), defendant Gerald Schwartz, alleges that during the period between August 30, 1968 and April 19, 1969, when the Woodcrest Nursing Home received advance financing payments in the sum of

$105,116.00, I was managing partner of said general partnership; that by virtue of an agreement among the partners, I was forbidden to incur an obligation for the partnership in excess of $5,000.00 unless the same was approved by a majority in principal of the partners and signed by at least two of them; that the obligation to repay said sum of $105,116.00 was incurred for the woodcrest Nursing Home by me in violation of them and without the signatures of at least two of them; that by reason of the foregoing, defendant, Gerald Schwartz, was required to and did pay to plaintiff $29,253.80, of which $24,253.80 was incurred by me for the said partnership in violation of the partnership agreement as aforesaid, and if defendant, Gerald Schwartz, be held liable to

plaintiff for the sum of $75,862.20, that I will then be liable to the defendant, Gerald Schwartz, in that sum, plus the sum of $24,253.80 as hereinabove set forth.

13. As a second crossclaim (Paragraphs 16 and 17 of his answer), defendant, Gerald Schwartz, alleges that during the period from August 30, 1968 to April 18, 1969, at the time the alleged payments from the intermediary were received by Woodcrest Nursing Home general partnership in the sum of $105,116.00, defendant, Donald D. Goldberg, had a 50% interest in such partnership and was liable for 50% of its liabilities; that defendant, Gerald Schwartz, paid to plaintiff the sum of $29,253.80 on account of the aforesaid liability of $105,116.00, and that if he

be held liable to plaintiff for the sum of $75,862.00, that I be liable to him for 50% of $105,116.00 or $52,558.00.

14. As a third crossclaim (Paragraphs 27 through 29 of his answer), defendant, Gerald Schwartz, repeats the allegations contained in Paragraphs 18 through 26 of his answer (which is the counter-claim alleged against the United States of America, plaintiff herein), and then goes on to allege that on or about November 29, 1968, I entered into a certain indemnity agreement referred to therein wherein and whereby I agreed that in the event there is any disallowance for services rendered by O.R.I. as to rate, then I would indemnify the partnership.

15. In my answer to the alleged crossclaims, I denied those allegations

contained in the paragraphs of the answer of the defendant, Gerald Schwartz, designated as Paragraphs 12, 13, 14, 15, 17, 18 and 29, and, in addition, set forth various defenses to the crossclaims.

16. In defends of the various crossclaims, I alleged:

(a) In defense against the first, second and third crossclaims, I alleged that heretofore the defendants, Gerald Schwartz and I, as General Partners of Woodcrest Nursing Home had an accounting in proceedings in arbitration of our respective interests in Woodcrest Nursing Home and a balance was struck and an award in accordance therewith was duly renedred in my favor against defendant, Gerald Schwartz, after which a judgment thereon was docketed in the

Office of the Clerk of the Supreme Court of the State of New York, County of Queens, on or about November 25, 1975, and that judgment is res adjudicata as to all claims of the defendant, Gerald Schwartz, arising out of the partnership relationship between Gerald Schwartz and me as General Partners of Woodcrest Nursing Home. Attached hereto and made part hereof are copies of the Award and Judgment marked Exhibits "G" and "H" re;

(b) In further defense of the first crossclaim, I alleged that the agreement among the partners, described in Paragraph 12 of the answer of the defendant, Gerald Schwartz, did not prohibit the acceptance of advance payments which were an advance of working capital on behalf of the partnership, and

further that the partnership used and accepted the benefits of the advance payments from the United States of America and is now estopped to deny the right of the plaintiff to make the advance payments;

(c) That the third crossclaim is improperly made in that it does not arise out of nor is it related to the transaction or occurrence that is the subject of the original action and is not such a claim upon which relief can be granted in this action;

(d-1) The agreement referred to in Paragraph 28 of the third crossclaim of defendant, Gerald Schwartz, refers only to a partial reimbursement required by reason of an incorrect or inappropriate rate, and has in the arbitrators proceedings aforesaid been adjudicated

to mean that any liability on my part shall be predicated upon a final determination that the charges made by me and paid by Woodcrest Nursing Home shall not be reimbursable by virtue of an incorrect or inappropriate rate only. In the arbitration proceedings, Mr. Thomas F. Ryan testified that the $9.00 rate charged by defendant Goldberg was in fact an appropriate rate;

(d-2) Furthermore, before defendant Schwartz may recover on the crossclaims relating to the indemnity agreement referred to in Paragrpah 28 of the answer, he must allege and prove that he has in fact suffered damages for which he seeks indemnification. The facts are, as has been demonstrated in the arbitration proceeding, that defendant is misguided in his claim for

indemnity as alleged in his answer claiming the sum of $171,442.00 from defendant Donald D. Goldberg. Correctly, and as was demonstrated in the arbitration proceedings, the amount charged by defendant Goldberg, operating as the Orthopedic Rehabilitation Institute to Woodcrest were recorded as expenses on the books of Woodcrest Nursing Home Partnership. In turn the partnership billed Medicare for those amounts and received and recorded the same as income. Thus, there is no effect on the partnership profit and loss for the periods involved. The sum of $174,014.00 is the amount billed by Orthopedic Rehabilitation Institute to Woodcrest General Partnership. Aaginst this billing, Woodcrest received $147,988.00 which amount was paid over

to ORI for inpatient therapy. The difference was never paid to ORI so that Woodcrest Nursing Home (general partnership) paid to ORI precisely the amount it received, and, therefore, is not "out of pocket" nor did it sustain any loss in any amount. Attached hereto and made part hereof is a statement of the account setting forth the amount billed by ORI and the amount received from Woodcrest. This Statement was received in evidence in the arbitration proceedings and is submitted herewith as Exhibit "K". The foregoing is offered to demonstrate that this issue too, was litigated in the arbitration proceedings. It is abundantly clear from the foregoing that no money whatsoever was advanced by Woodcrest General Partnership on account of ORI billing and to

date none of these sums paid by Travelers, fiscal intermediary for Department of Health, Education and Welfare, has been repaid to it by Woodcrest General Partnership or by Schwartz. Until such repayment is actually made, defendant Woodcrest has sustained no loss or damages and is not entitled to recover thereon from me. In the absence of such repayment by Woodcrest or Schwartz, to Travelers, payment by me to Schwartz or Woodcrest General Partnership would constitute unjust enrichment to them. Ergo, this crossclaim by Schwartz is without any basis in fact or law and should be dismissed. As will be demonstrated in the accompanying Memorandum of Law, as a matter of law, before any indemnity agreement may be effectuated the event

against which it is intended to indemnify must be shown to have occurred. Before the Panel of arbitrators and before the Appellate Division and on the motions for leave to appeal to the Court of Appeals, it was argued by defendant Goldberg that before the alleged indemnity could become operative, defendant Schwartz must first demonstrate that he is liable for and is required to repay Travelers Insurance Company any amount which it may be determined to owe. Until there is proof that a claim is made by the Government or Travelers which is reduced to judgment, which defendant Schwartz has paid, he may not recover on this indemnity agreement.

(d-3) Finally, it should be noted that Woodcrest General Partnership

has not exhausted its administrative remedies with reference to its claims for reimbursement as to this item. Defendants Woodcrest General Partnership and Gerald Schwartz must concede this for in an affidavit sworn to on May 17, 1977 by Charles Haydon, a member of the defendant's law firm, he stated:

> "6. The indemnity agreement between plaintiff and defendant (p. 198 Printed Record on Appeal) provided that respondent (Goldberg) would reimburse appellant (Schwartz) within thirty days after such a determination; however, when the arbitrators and then this Court (N.Y.. Appellate Division, Second Department) decided that appellant (Schwartz) could not sue respondent (Goldberg) upon the agreement until after a court of competent jurisdiction determined that the funds were not reimbursable by appropriate agency it left appellant (Schwartz) in a position where he was required to exhaust administrative remedies.

> 7. The first of these administrative remedies is the 'intermediary hearing'; after the Travelers Insurance Company made the finding that the funds were not reimbursable and this Court (N.Y. Appellate Division, Second Department) affirmed the award, the parties cooperated in an effort to obtain a reversal of the finding through 'intermediary hearing.' ***"

Thereafter a formal hearing was had and a determination made confirming the intermediary's decision. Then Mr. Haydon's affidavit continued.

> "9. The matters under consideration are relegated by Congress to the Secretary of Health, Education and Welfare and pursuant to title 42 U.S.C.A. Section 405g, no action may be brought until 'after any final decision of the Secretary after hearing to which he was a part. ***'
>
> 10. There is a right to appeal the intermediary decision to a Provider Reimbursement Review Board established in accordance with 42 U.S.C.A. Section 1395oo(a) which consists of 5 members appointed by the Secretary of

> Health, Education and Welfare, that Board may take evidence issue subpoenas and the like ***;
>
> 11. The Secretary may then elect to review a Board decision but neither party has the right to such a review; the Secretary of Health, Education and Welfare is required to advise the parties of his decision to review or not review; the regulation in this regard says that it should be done promptly ***.
>
> 12. The Secretary may then affirm, reverse or modify or remand to the Board its decision, ***.
>
> 13. After review by the Secretary, if it is adverse to the provider then, for the first time may resort be had to a court of competent jurisdiction and that, too, depends upon the form of the ultimated decision."

This is quoted from an affidavit of Mr. Haydon to demonstrate that the defendant Schwartz and Woodcrest General Partnership know that they have not yet exhausted their administrative remedies

and the counterclaim as well as the crossclaim are premature.

17. It is respectfully submitted that the very issues raised by the crossclaims of defendant Schwartz against your deponent were matters in issue in the arbitration accounting proceedings between defendant Schwartz and your deponent which resulted in an award in favor of your deponent upon which judgment was entered in the Supreme Court, Queens County and later sustained on appeal.

18. Originally, the arbitration proceedings were instituted by me for an accounting in connection with a limited partnership in which defendant Schwartz and I were interested. The defendant Schwartz on his part interposed a counterclaim against me for 50% of the

losses of the Woodcrest Nursing Home in which I was a 50% general partner. (Exhibit "L".) The arbitrators, recognizing this to be a controversy between partners and cognizant of the law that before any claim by one partner against another may be adjudicated there would have to be an accounting, discussed the matter with counsel for both parties. With their consent, they made an order dated July 6, 1972 which was subscribed by each of the arbitrators based on and reciting the consent of the parties and directing that each of the parties have access to the books and records of each of the partnerships and make an accounting therefrom to support their respective claims. Following is the pertinent portion of the order:

> "The parties have indicated that they wish to proceed with the preparation of a report based on an examination through their respective accountants of the books andrecords of the two Woodcrest Nursing Home partnership, the partnership relating to the construction of the 'Cliffside Nursing Home', and related books and records of Peat, Marwick & Mitchell and others, if any, for the purpose of assisting in the determination of amounts which may be due or owing among the parties." (Exhibit "A", p. 70 Printed Record on Appeal.)

19. Pursuant to the direction of the arbitrators, upon and with the consent and approval of counsel and all parties, defendant Schwartz as well as your deponent submitted voluminous statements of their respective claims based on the books and records of the partnership. Your deponent set forth in full and at length his claims with respect to the Woodcrest General

Partnership in which he claimed a 50% interest (pp. 71-98, 120-167, 168-178, 181-184, 224-225, Printed Record on Appeal.) Defendant Schwartz on his part likewise submitted claims with respect to Woodcrest Nursing Home General Partnership (120-167). Defendant Schwartz's counsel conceded the need for a final accounting for at the hearing in the arbitration proceeding held on May 4, 1972 he stated:

> "When the final accounting comes, we will then be able to straighten out what the numbers (balance due the respective parties) are." (223 Printed Record on Appeal.)

20. The issue of current financing and the right of defendant Goldberg to apply for and accept the advance payments was a very live issue in the arbitration proceeding which was litigated at length and in depth. It

was very clearly and succinctly stated as such by Arthur B. Hooker, Chairman of the Arbitration Panel at the hearing which took place on August 13, 1974 (S.M. 1608) when he stated the issue in the following terms:

> "I think we have a difficulty in characterization of the current financing, whether it is authorized under the partnership agreement or not. That could be briefed."

21. In fact in defendant's final brief submitted in the arbitration proceedings at page 28a he defined "current financing" as one of the issues in the arbitration proceedings. It is also most significant that in the arbitration proceedings defendant Schwartz, called as his witness Mr. Thomas F. Ryan, Reimbursement Representative for the Travelers Insurance Company, which is commissioned by the Federal Government

to administer the Medicare Reimbursment Program and other matters for the Burreau of Health Insurance, H.E.W., who stated his duties are to consult with providers of services informing them of federal regulations, assisting them in determining the cost of services to Medicare's beneficiaries under the act, and also review costs reports to adjust them to the actual cost of services as provided for in the regulations, and further he stated that he was acquainted with the account of Woodcrest Nursing Home and that he was in charge of that account during the period 1968, 1969 and 1970, and that he was acquainted both with Mr. Schwartz and Dr. Goldberg, the defendants in this action. Mr. Ryan testified at great length relative to the current financing referred to in

this action. His testimony is set forth in pages 1459 to 1623 of the minutes of August 13, 1974, taken in the arbitration proceedings in which the accounting between the parties was held. Defendant Schwartz, in fact, relied heavily on Mr. Ryan's testimony in the arbitration proceedings. Mr. Ryan's testimony consumed 160 pages and he dwelt at great length upon the issue of current financing and went into great detail thereon. (S.M. 1460-1620.) Significantly at page 1613, in response to a question by Mr. Kurtz one of the arbitrators:

> "MR. KURTZ: (Member of the Panel) In your experience in this department, could you give us a rough estimate as to the percentage of nursing homes or standard care facilities that use current financing -- would it be most of them, few of them?

MR. RYAN: (the Witness)
An educated guess, I would say almost all of them, 99 per cent did avail themselves of this.

MR. HOOKER: (the Chairman)
Was this a practice which was well known?

MR. RYAN: (the Witness)
Yes, also providers were made aware of the availability.

MR. HOOKER: (the Chairman)
I think it might be helpful to have in evidence the application. ***

MR. DUBLIRER: (Counsel for Defendant)
I will offer it in evidence."

22. As further evidence of the fact that the matter of current financing was an issue thoroughly litigated in the arbitration proceeding, we need only look at the many references thereto in the record. In defendant's brief submitted in the arbitration proceedings it is referred to on the following pages: 4, 19, 28a, 36, 40, 41 and 42. In the

transcript of the record it is referred to on the following pages: 1460-1620, 1992, and at p. 182 of the Printed Record on Appeal. It is also referred to as claimant's exhibit 29 of December 19, 1974. It is plain, therefore, the issue of current financing as between defendants Goldberg and Schwartz having been thus litigated and award given to defendant Goldberg, it is final, finding and res adjudicata and may not be the subject of litigation between the same parties.

23. The arbitration consumed fourteen (14) hearing dates to wit, May 4, July 6, and November 14, 1972, September 10-11, 1973, and March 14, May 21-22, June 25-26, August 13-14 and December 17-18, 1974. Two thousand Eighty Nine (2,089) pages of

stenographic minutes of the hearing were taken. The claimant submitted forty seven (47) exhibits and respondent submitted fifty five (55) exhibits.

24. It is abundantly clear that the matter of current financing as were all other disputes between me and defendant Schwartz were fully and painstakingly litigated in the arbitration proceedings. The defendants, Gerald Schwartz and Donald D. Goldberg, having thus litigated the issue raised by the crossclaims including that of current financing, and a judgment having been rendered in the accounting proceedings in favor of the defendant, Donald D. Goldberg, these matters are res adjudicata, the defendant, Gerald Schwartz's crossclaim predicated upon the complaint and counterclaim in this

action must be dismissed as having been previously adjudicated in the arbitration proceedings. The Court should significantly note as did the arbitrators, that an accounting proceeding is the only manner in which partnership disputes may be resolved, for as I am informed and verily believe, one partner may not sue another for any cause arising out of the partnership. An accounting proceeding having thus been had and the dispute resolved, it is res adjudicata in this action.

25. The matter of the disputes between defendant Schwartz and your deponent as general partner in the Woodcrest Nursing Home having been resolved in an accounting in the arbitration proceeding, an award having been made in favor of your deponent and judgment in

the Supreme Court of the State of New York, County of Queens having been entered theron, it is res adjudicata as to all matters embraced therein including the matter of current financing which is the subject matter of Counts I and II of the complaint and crossclaim of defendant Schwartz against your deponent.

Finally, I point out to his court that defendant Gerald Schwartz is a resident of the State of New York, resiiing at Mamaroneck, Wesctchester County, New York. Attached hereto is a photocopy of a letter dated January 17, 1978 in which he tacitly makes that admission.

WHEREFORE, Donald D. Goldberg respectfully prays that Counts I and II of the amended complaint be dismissed as

against Woodcrest Nursing Home Partnership and himself and that crossclaims numbered, First, Second and Third of the answer interposed by defendants Woodcrest Nursing Home and Gerald Schwartz be dismissed and summary judgment granted in favor of the defendant accordingly.

/s/
Donald D. Goldberg

Sworn to before me this
14th day of December, 1981.

Notary Public

Norma Polce
Notary Public, State of New York
No. 30-3123475 - Nassau County
Commission Expires March 30, 1983

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the.....tenth....day of....May.....A.D. 1977

Present, Hon. Charles D. Breitel, Chief Judge, presiding.

Mo. No. 471
In the Matter of
the Arbitration of Certain Controversies between
Donald D. Goldberg,

Respondent,

Gerald Schwartz, individually
and as General Partner of
Woodcrest Nursing Home and
Cliffside Nursing Home,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

s/J.B.W.
Civil Action No.
76 C 1101

ORDER

Filed in Clerk's
Office U.S. District
Court E.D.N.Y.
May 26, 1982.

UNITED STATES DISTRICT COURT s/J.B.W.
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

Plaintiff,

-against-

WOODCREST NURSING HOME , a partnership, GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home, DONALD D. GOLDBERG, IRWIN M. ROSENTHAL, JACK E. BRONSTON, and HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of LAWRENCE PEIREZ,

Defendants.
----------x

It appearing to the Court that the minutes of the Clerk of this Court on the docket of the above entitled matter for May 5, 1982, have been transcribed

incorrectly as follows:

> "Before WEINSTEIN, CH.J.-Case called. Counsel for all sides present. Pltff's motion for an order granting summary judgment - Granted as to Schwartz for the reasons stated on the record. Deft Donald D. Goldberg's cross-motion pursuant to Rule 56 w/respect to Counts I & II of the amended complaint & dismission the first, second & third crossclaims etc., Denied. Deft's Rosenthal, Bronston & Peirez, Hilda & Wm. & Barbara Kirby as Executors of the Estate of Lawrence Peirez motion for an order pursuant to Rule 56 granting summary judgment in favor of defts - Denied. Dismissed as to Rosenthal, Bronston & Peirez no costs & disbursements. Deft's Woodcrest Nursing Home & Gerald Schwartz's motion for summary judgment against pltff & co-deft Donald D. Goldberg dismission the complaint - argued - Denied. Court accepts jurisdiction on diversity & finds Goldberg liable to Schwartz for failure to cooperate under the arbitration decision. Govt to submit judgments as to Schwartz w/interest & Schwartz against Goldberg w/interest fm time of

order. Parties to work out form. Case closed, no costs & disbursements."

it is,

ORDERED, that the minutes of this Court on the docket of this action for May 5, 1982 shall be corrected to read as follows:

"Before WEINSTEIN, CH.J.-Case called. Counsel for all sides present. Pltff's motion for an order granting summary judgment - Granted as to Schwartz for the reasons stated on the record. Deft Donald D. Goldberg's cross-motion pursuant to Rule 56 w/respect to Counts I & II of the amended complaint & dismissing the first, second and third crossclaims etc., Denied. Deft's Rosenthal, Bronston & Peirez, Hilda & Wm. & Barbara Kirby as Executors of the Estate of Lawrence Peirez motion for an order pursuant to Rule 56 granting summary judgment in favor of defts - Granted. Dismissed as to Rosenthal, Bronston & Peirez, no costs & disbursements. Deft's Wood-crest Nursing Home & Gerald Schwartz's motion for summary judgment against pltff &

co-deft Donald D. Goldberg dismissing the complaint - argued - Denied. Court accepts jurisdiction on diversity & finds Goldberg liable to Schwartz for failure to cooperate under the arbitration decision. Govt to submit judgments as to Schwartz w/interest & Schwartz against Goldberg w/interest fm time to audit. Parties to work out form. Case closed, no costs & disbursements."

Dated: Brooklyn, New York
May 24, 1982

E N T E R

/s/Jack B. Weinstein
United States District Judge

DTD: 5/25/82

CLOSED
Civil Action No.
76 C 1101 (JBW)

(Weinstein, Ch.J.)

JUDGMENT

F I L E D

In Clerk's Office
U.S. District Court E.D.N.Y.

* JUN 14, 1982 *

Time A.M._____
P.M._____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home, DONALD GOLDBERG, IRWIN M. ROSENTHAL, JACK E. BRONSTON, and HILDA PEIREZ, WILLIAM PEIREZ and BARBARA KIRBY, as Executors of the Estate of LAWRENCE PEIREZ,

Defendants.
----------x

A motion by the plaintiff, United States of America, for summary judgment in its favor for the full amount prayed for in the complaint having been duly brought on to be heard, and the Court having made an order pursuant thereto granting the plaintiff's motion against defendant, Gerald Schwartz, and directing that judgment be entered in plaintiff's favor for the full amount prayed for against defendant, Gerald Schwartz, with pre-judgment interest and without costs or disbursements, and dismissing the counterclaims of defendant, Gerald Schwartz against plaintiff; and a cross-motion by the defendants, Woodcrest Nursing Home and Gerald Schwartz, for summary judgment in favor of defendant, Gerald Schwartz, on his third cross-claim against defendant,

Donald Goldberg, having been duly brought on to be heard, and the Court having made an order pursuant thereto granting the said defendants' cross-motion and directing that judgment be entered in therein against defendant, Donald Goldberg, with interest from the date of accrual of the cause of action therefor; and cross-motion of defendant, Donald Goldberg, for an order dismissing the complaint and the cross-claims of defendants, Gerald Schwartz and Woodcrest Nursing Home, having been duly brought on to be heard, and the Court having made an order denying the said motion with respect to the third cross-claim of such defendants and otherwise granting the same without costs and disbursements; and the defendants, Irwin M. Rosenthal, Jack E. Bronston and Hilda

Peirez, William Peirez and Barbara Kirby, as Executors of the Estate of Lawrence Peirez, having moved for summary judgment dismissing the complaint as to them and the Court having granted such motion and dismissed the complaint as to them without costs and disbursements; it is hereby

ORDERED, ADJUDGED AND DECREED, that plaintiff, United States of America, recover the sum of $214,039.95, without costs or disbursements, which sum consists of the sum of $75,862.20 plus interest at the statutory rates from the date of accrual of the cause of action therefor and the sum of $58,332.12 plus interest at the statutory rates from the date of the accrual of the cause of action therefor; and it is further

ORDERED, ADJUDGED AND DECREED, that plaintiff, United States of America, shall recover from defendant, Gerald Schwartz, interest on the sum of $214,039.95, at the statutory rate of Nine Percent (9%) per annum from the date of entry of this judgment to the date of payment thereof; and it is further

ORDERED, ADJUDGED AND DECREED, that the counterclaim of defendant, Gerald Schwartz, against plaintiff, United States of America, be, and it hereby is, dismissed on the merits; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant, Gerald Schwartz, residing at 5005 Collins Avenue, Miami Beach, Florida, recover of the defendant, Donald Goldberg, residing at 184-523

Tudor Road, Jamaica, New York, the sum of $171,442.00, with interest in the sum of $102,007.98, totalling the sum of $273,449.98; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant, Gerald Schwartz, recover of the defendant, Donald Goldberg, interest on the said sum of $273,449.98 at the statutory rate of Nine Percent (9%) per annum from the date of entry of this judgment to the date of payment thereof; and it is further

ORDERED, ADJUDGED AND DECREED, that the complaint is dismissed as against the defendants, Donald Goldberg, Irwin M. Rosenthal, Jack E. Bronston, and Hilda Peirez, William Peirez and Barbara Kirby, as Executors of the Estate of Lawrence Peirez.

Dated: Brooklyn, New York
June 10, 1982

/s/Jack B. Weinstein
U.S.D.J.

American Arbitration Association
Case No. 1310-0438-71
Jul 6 1972
No. C1-7
Exhibit

THE ORTHOPEDIC & REHABILITATION INSTITUTE
175-62 Hillside Avenue
(at 170th Street)
Jamaica, N.Y. 11432

(212) 291-6600

Nov. 8, 1968

Donald D. Goldberg, M.D.
Medical Director

Dear Mr. Malloy:

The Orthopedic and Rehabilitation Institute, founded by me in late 1965, and operating under a business certificate issued to me in New York, is a private practice rehabilitation clinic.

It supplies rehabilitation services, under arrangements to:

1. Hollis Park Gardens Nursing Home, Hollis, N.Y.

2. Irwin Nursing Home, St. Albans, N.Y.
3. Queens Manor Nursing Home, Ozone Park, N.Y.
4. Cortelyou Nursing Home, Brooklyn, N.Y.
5. St. Albans Nursing Home, St. Albans, N.Y.

The Institute also maintains its own out patient clinic at the above address. It has supplied such services since 1965 to the above facilities charging uniform fees and rates for services.

Recently, as an individual, I have become a 15% limited partner in the ownership of the Woodcrest Nursing Home and a 50% general partner in the operating company of Woodcrest Nursing Home.

The Orthopedic and Rehabilitation Institute intends to supply rehabilitation services by written arrangement to the Woodcrest Nursing Home under the same terms and conditions as the other facilities it services.

Will you kindly advise me as to whether services supplied by the Orthopedic and Rehabilitation Institute will be considered as a related organization for Medicare - cost reimbursement purposes.

Very truly yours,

/s/Donald Goldberg

AMERICAN ARBITRATION ASSOCIATION

CASE No._____

JUL 6 1972

No. C1-6
_____Exhibit

THE TRAVELERS
THE TRAVELERS INSURANCE COMPANY
THE TRAVELERS INDEMNITY COMPANY

Joint Street Office
80 John Street
New York, New York 10038
Telephone: DIgby 4-7000

November 19, 1968

Donald D. Goldberg, M.D.
The Orthopedic & Rehabilitation
Institute
175-62 Hillside Avenue
Jamaica, New York 11432

Dear Doctor Goldberg:

In response to your letter of November 8th dealing with your association with Woodcrest Nursing Home as a partner I should point out to you that costs applicable to services,

facilities, and supplies furnished to the provider (Nursing Home) by organizations related to the provider by common ownership or control are includible in the allowable cost of the provider at the cost to the related organization.

An exception is provided to this general principle if the provider demonstrates by convincing evidence to the satisfaction of the fiscal intermediary, that the supplying organization is a bona fide separate organization; that a substantial part of its business activity of the type carried on with the provider is transacted with others than the provider and organizations related to the supplier by common ownership or control and there is an open, competitive market for the type of

services furnished by the organization; that the services are those which commonly are obtained by institutions such as the provider from other organizations and are not a basic element of patient care ordinarily furnished directly to patients by such institutions; and that the charge to the provider is in line with the charge for such services in the open market and no more than the charge made under comparable circumstances to others by the organization for such services. In such cases, the charge by the supplier to the provider for such services shall be allowable as cost.

Based on the information you have supplied in your letter of November 8th we will consider the cost to Woodcrest Nursing Home for the services of the

Orthopedic & Rehabilitation Institute as allowable cost under the Medicare program.

Very truly yours,

/s/_____

Office Supreme Court, U.S.
FILED
AUG 9 1983
L. STEVAS,
CLERK

83-82

No.

IN THE

Supreme Court of the United States

October Term, 1983

DONALD GOLDBERG,

Petitioner,

against

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually and doing business as WOODCREST NURSING HOME,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

CHARLES HAYDON
Attorney for Respondents
67 Wall Street
New York, NY 10005
(212) 943-0880

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NO.

SUPREME COURT OF THE UNITED STATES

OTOBER TERM, 1983.

DONALD GOLDBERG,

Petitioner,

against

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually and doing business as Woodcrest Nursing Home,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit appears at 706 Fed. 2d 70. The decision of the District Court is reprinted in the appendix at page A-173.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Statutes and Regulations Involved.

In addition to the Federal Rules of Civil Procedure set forth in the petition, the following statutes and regulations are involved:

FRCP 13(a):

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

42 CFR §405.437:

> "(a) *Principle.* Costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.
>
> "(b) *Definitions* (1) *Related to provider.* Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.
>
> "(2) *Common ownership.* Common ownership exists when an individual or individuals possess

significant ownership or equity in the provider and the institution or organization serving the provider.

* * *

"(d) *Exception.* An exception is provided to this general principle if the provider demonstrates by convincing evidence to the satisfaction of the fiscal intermediary (or, where the provider has not nominated a fiscal intermediary, the Health Care Financing Administration), that the supplying organization is a bona fide separate organization; that a substantial part of its business activity of the type carried on with the provider is transacted with others than the provider and organizations related to the supplier by common ownership or control and there is an open, competitive market for the type of services, facilities, or supplies furnished by the organization; that the services, facilities, or supplies are those which commonly are obtained by institutions such as the provider from other organizations and are not a basic element of patient care ordinarily furnished directly to patients by such institutions; and that the charge to the provider is in line with the charge for such services, facilities, or supplies in the open market and no more than the charge made under comparable circumstances to others by the organization for such services, facilities, or supplies. In such cases, the charge by the supplier to the provider for such services, facilities, or supplies shall be allowable as cost."

Statement of the Case.

This case dealt with Medicare, the relation of the Department of Health, Education and Welfare ("HEW")

to "providers," and the separate interests of persons who had been partners in a provider.

Hospitals, facilities, such as defendant, Woodcrest Nursing Home ("Woodcrest"), and home health agencies are called "providers of services" or "providers" (42 USC §1395x[u]). They furnish services and are reimbursed from Medicare for the reasonable costs of all such services.

The action was brought by HEW to recover moneys claimed to be due as the result of (1) current financing and (2) advance payment for services.

Current financing comprises payments by HEW to help providers further the Medicare program for people over 65; it constitutes an interest free demand loan pursuant to CFR §405.454(g).

Advance payments for services are made by HEW and are based upon estimates and unaudited statements furnished by a provider. Final adjustment is made from time to time after audit.

Payments to providers are made for the plaintiff by intermediaries (42 USC §1395h), and in this case the intermediary was Travelers Insurance Company ("Travelers").

At the relevant times Woodcrest was a provider and it was structured as a general partnership whose partners were the petitioner Goldberg, the respondent Schwartz and three others. Goldberg was Woodcrest's managing partner, with full power to enter into contracts on its behalf.

Among the contracts into which Goldberg entered was one with Orthopedic and Rehabilitation Institute ("ORI"), which was wholly owned by Goldberg and which rendered services to Woodcrest for which it was paid $171,442.

Goldberg's interest in both organizations brought ORI into the Medicare regulations which characterized it as "related" to Woodcrest (42 CFR §405.427[b]), and Woodcrest would not be entitled ordinarily to reimbursement from HEW for an amount greater than the actual cost to ORI of the services rendered.

Aware of the regulations, the parties entered into a special agreement on November 29, 1968, which read as follows (A-7; A-87, 88):

> "In the event that the United States of America or its appropriate governmental sub-division, or any appropriate insurance carrier or fiscal agent of agency, under and pursuant to the Medicare of similar successor program, determines at any time, up to and including the annual audit for any year, but not thereafter, that any charge or charges made by the Orthopedic and Rehabilitation Institute, during such year to the Woodcrest Nursing Home, for care rendered to patients of the nursing home are by virtue of incorrect or inappropriate rate, not reimbursable in part, then such amount or amounts so determined to be excessive of non-reimbursable, will be borne by the Orthopedic and Rehabilitation Institute and repaid to the General Partnership within thirty (30) days after such determination by such governmental or other Agency."

Travelers thereafter caused an audit to be conducted of Woodcrest and determined that HEW should not reimburse Woodcrest for the $171,442 the latter had paid ORI. In determining the amount due from Woodcrest for current financing and advance payments, plaintiff arrived at a net figure, equal to the amount for which it sued, by deducting the $171,442 which Woodcrest had paid (A-12) to ORI. By this time Schwartz was the sole owner of Woodcrest (A-11).

Accordingly, Schwartz and Woodcrest counterclaimed against the plaintiff for reimbursement of the $171,442 and cross-claimed against Goldberg for the same amount, conditionally, that in the event the Court determined that the sums paid to ORI were not reimbursable (A-88), Goldberg was liable for that amount by virtue of the indemnity agreement of November 29, 1968.

When Travelers refused reimbursement to Woodcrest for the money it paid ORI, both Woodcrest and Goldberg asked for an "intermediary hearing" (20 CFR, Chapt. 3, Subpart R, §§ 405.1801-405.1809). As the Court found below, ORI refused to make its books and records available for audit. The books and records were required by HEW so that ORI's costs could be determined.

There were four separate proceedings at which Goldberg was requested to and refused to make ORI's books and records available. First, at the audit (A-8); then at an intermediary hearing (A-12); then at pre-trial discovery; and finally upon a remand to Travelers (A-12, 13). In the absence of such books, Woodcrest could not demonstrate that, although ORI was "related," the parties came under a statutory exception which provided for full reimbursement if it could be demonstrated that

> " 'a substantial part of (ORI's) business activity of the type carried on with (Woodcrest) (was) transacted with others than (Woodcrest) and organizations related to (ORI) by common ownership or control * * *' §405.427(d)" (A-10).

Goldberg's refusal to make ORI's books and records available demonstrates an extreme disregard for his obligations. For the very arbitration which he claims settled the claims between Schwartz and Goldberg resulted in a direction to him to cooperate in the process of effecting a determination of the propriety of ORI's charges. As the Court of Appeals found, the arbitrators dismissed Schwartz's claim for reimbursement, without prejudice and stated (A-12):

> "[n]othing in this AWARD shall preclude Gerald Schwartz from making a claim on the memorandum dated November 29, 1968 amending the General Partnership Agreement for the operation of Woodcrest, but only upon the final determination of a court of competent jurisdiction that charges made by the Orthopedic and Rehabilitation [*sic*] Institute ("ORI") and paid by Woodcrest to ORI should not be reimbursed by the appropriate agency by virtue of incorrect or inappropriate rate. *Dr. Goldberg is directed to cooperate fully in the process of effecting such determination.*" (Emphasis supplied by the Court of Appeals.)

The very judgment which Goldberg claims is *res judicata*, when affirmed by the Appellate Division of the State of New York, Second Department, contained a stay of execution,

"to enable (Schwartz) to litigate his claim for indemnity * * *"

The Court of Appeals pointed out (footnote 10, A-52) that the predicate for the finding in favor of Schwartz against Goldberg was the finding that HEW was not required to reimburse Schwartz.

Reasons for Denying the Writ.

The petitioner presents not even a semblance of an argument that there are special or important reasons for granting the writ. No attempt is made to elevate the reasons offered by petitioner to the character of reasons delineated in Supreme Court Rule 17 as those that would be considered.

No argument is offered to show that the United States Court of Appeals for the Second Circuit rendered its decision in conflict with another federal court of appeals on the matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The differences between Schwartz and Goldberg are of no significance to others than Schwartz and Goldberg. Each of the purported arguments raised by Goldberg is of no importance anywhere, except in this case, and each is utterly without substance.

Dealing with the "reasons" offered by petitioner in the order in which they are presented will demonstrate that

none of them has substance and in fact all are so frivolous as to merit the imposition of sanctions.

The Arbitration Proceeding.

The Court of Appeals found that "nothing could be clearer than the fact that the arbitrators' award was not a final determination of the rights of Schwartz and Goldberg under the ORI Repayment Agreement" (the agreement of November 29, 1968) (A-34).

Arbitration proceedings in New York do not, of themselves, settle all differences that may ever arise between the parties. The award upon which Goldberg relies was conducted under New York law, and as the Appellate Division, First Department, said *In re Todd Shipyards Corp.*, 67 A. D. 2d 646, 412 N. Y. S. 2d 376, 377:

> "That the arbitration award may have different measures of finality as between the parties in different eventualities does not invalidate the arbitration. Cf. *Matter of Riccardi (Modern Linen Supply Co.)*, 45 A. D. 2d 191, 193, 356 N. Y. S. 2d 872, 875 (1st Dept. 1974), affd. 36 N. Y. 2d 945, 373 N. Y. S. 2d 551, 335 N. E. 2d 856 (1975). Multi-step arbitrations and different rights to arbitration as between the parties and even advisory arbitration awards are not unknown to the law. Cf. *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 94 S. Ct. 1101, 39 L. Ed. 2d 147 (1974); *Wertheim & Co. v. Halpert*, 65 A. D. 2d 724, 411 N. Y. S. 2d 11 (1st Dept. 1978); see *Board of Education v. Yonkers Federation of Teachers*, 46 N. Y. 2d 727, 413 N. Y. S. 2d 370, 385 N. E. 2d 1297 (1978)."

The direction of the arbitrators to Goldberg to cooperate in the determination of whether and to what extent the indemnity claim was reimbursable is a clearly enforceable provision of the arbitration award.

> "Traditionally, arbitrators have been licensed to direct such conduct of the parties as is necessary to the settlement of the matters in dispute * * *" (Desmond, J., in *Ruppert v. Egelhofer,* 3 N. Y. 2d 576, 581, 170 N. Y. S. 2d 785, 788).

While Goldberg prates about the arbitration award as settling the issues between the parties, by refusing to cooperate and trying to avoid the indemnity agreement, he is seeking to unsettle the issues and avoid the clear direction of the arbitrators.

In addition, he seeks to avoid the arbitrators' direction that he cooperate and abide by the indemnity agreement. The agreement clearly states (A-50) that when an appropriate insurance carrier or fiscal agent determines that any charge by ORI was not reimbursable, then such amount as is determined to be nonreimbursable would be borne by ORI.

The fiscal agent has found that the charges were not reimbursable by reason of the fact that they were wrong (because ORI was related), and that the cost could not be determined (because Goldberg has refused to cooperate or to produce ORI's records and books).

Estoppel and No Damages.

The Court of Appeals found as a fact that respondent made payments to ORI in the sum of $171,442 (A-8), and

that HEW refused to reimburse respondent for its payments to ORI (A-9).

Goldberg, himself, admitted the loss in his pleadings. His pleadings admitted paragraphs 20, 24, 25 and 26 of the cross-claim which were incorporated in paragraph 27 of the cross-claim (A-87).

Paragraph 20 (A-84) alleges that the services rendered by ORI were at a total cost to Woodcrest of $171,442; admitted.

Paragraph 24 alleges (A-86) that Woodcrest was entitled to receive reimbursement from plaintiff for its costs of $171,442; admitted.

Paragraph 25 (A-86) alleges that Travelers determined that Woodcrest was not entitled to reimbursement; admitted.

Paragraph 26 (A-86) alleges that plaintiff is indebted to Schwartz for the $171,442; admitted.

It does not need much argument to demonstrate that paragraph 27 of the cross-claim (A-87) was directed against petitioner and, as set forth in Rule 10 of the Federal Rules of Civil Procedure:

> "Statements in a pleading may be adopted by reference to a different part of the same pleading * * *."

The failure of petitioner to deny the statement of damages to respondent is clearly an admission (FRCP Rule 8[d]).

Since the record is clear that the reason for the refusal to reimburse Woodcrest is that ORI charged the wrong rate because it is a related organization, and since the true rate is not calculable because Goldberg hid ORI's books, Goldberg's complaint about a failure on Schwartz's part to show a loss is really a last resort to flim-flam.

It is true that Woodcrest and Schwartz are and were unable to demonstrate what the appropriate charge should have been. But that was because Goldberg has refused to produce the books and records of his wholly owned company, ORI, and for no other reason. It is for that that the District Court ordered a judgment against Goldberg "for failure to cooperate under the arbitration decision" (A-151).

The estoppel claim of petitioner is a most recent addition to his armory, but it should have no effect. Estoppel is an affirmative defense, which should be pleaded. Where, as in the case at bar, it is not pleaded, was not called to the attention of the District Court and not passed upon, it may not be raised on appeal. *Hartridge v. Aetna Cas. & Sur. Co.*, C.A. Ark. 1969, 415 F. 2d 809; *North Central Truck Lines, Inc. v. U. S.*, D. C. Mo. 1974, 381 F. Supp. 1217.

The Propriety of the Cross-Claim.

As the Court of Appeals found (A-52):

> "The cross-claim (against Goldberg) was raised conditionally, as Schwartz asserted that 'in the event' he was held liable on the United States' claim he was entitled to payment pro tanto from Goldberg."

The genesis of the cross-claim is the claim by the plaintiff for a balance as a "net amount" (A-56, A-73) due from Schwartz to plaintiff as the result of the disallowance of reimbursement for the $171,442 paid by Schwartz to ORI. Schwartz disputed the disallowance, and he pleaded a claim for that amount as a counterclaim. Since the claim arose from the same transaction as that upon which HEW sued Schwartz, it was required to be pleaded by Rule 13(a) of the Federal Rules of Civil Procedure, which states:

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

The right to counterclaim and even the obligation to counterclaim arose from FRCP 13. Certainly as Rule 13(a) has been construed, a counterclaim arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim" is a compulsory counterclaim (*United States v. Eastport Steamship Corp.*, 255 F. 2d 795 [2d Cir. 1958]).

In *Frederick v. United States*, 386 F. 2d 481, 488 (5th Cir. 1967), the Court held:

> "Our conclusion is that when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject of the government's suit * * *."

Running accounts have always been recognized as constituting a "transaction" for purpose of Rule 13. In *Parmelee v. Chicago Eye Shield Co.*, 157 F. 2d 582 (CCA 8, 1946), the Court cited with approval the case of *Story & Isham Commercial Co. v. Story,* 100 Cal. 30, 34, page 671, and quoted:

> "The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction. The transaction which was the foundation of the cause of action set forth in the complaint herein is not limited to the facts therein set forth, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of their written agreement."

The Second Circuit Court of Appeals held in *Lesnik v. Public Industrial Corporation,* 144 F. 2d 968 (1944), that "transaction" must be given a liberal interpretation. It then cited (144 F. 2d at p. 975) the language of the Supreme Court in *Moore v. New York Cotton Exchange,* 270 U. S. 593, 610, 46 S. Ct. 367, 371, 70 L. Ed. 750, where it said:

> " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

No relationship could have a more logical nexus for purposes of a counterclaim than the relationship between plaintiff's claims and Schwartz's counterclaim.

The cross-claim against Goldberg is authorized by Rule 13(g), which states:

> "(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

The purpose of Rule 13(g) is to permit all matters between all of the parties to be adjudicated in one, rather than many, trials, so long as there is a "logical relationship" between the cross-claim and the "transaction or occurrence" which is the subject matter of the complaint or counterclaim (*Lasa, etc., v. Southern Builders, etc.*, 414 F. 2d 143, 147, CA 6, 1969).

The claim of Schwartz rested upon the suit resulting from the disallowance of Woodcrest's payments to ORI. The counterclaim rested upon those same facts, and the cross-claim rested upon the same facts plus Goldberg's unequivocal promise to pay Schwartz 30 days after the claim was disallowed.

Goldberg's claim that Schwartz must first show damage is belied by their agreement and, as well, by the principle that Rule 13(g) permits the assertion of a cross-claim if the party against whom it is asserted "is or may be liable." Thus, in *Bohn v. American Export Lines*, 43 F. Supp. 228,

S.D.N.Y. 1941, the Court permitted a cross-claim even though at common law liability of the "cross-claimee" would not accrue until after judgment. The Court said:

> "although at common law, as pointed out in the *Uvalde* case *supra*, the liability sued upon had first to become fixed by a judgment, I think under Rule 13(g) * * * that element is no longer requisite, for it is plain that a cross-claim permitted thereunder 'include a claim that the party against whom it is asserted is or may be liable to the cross-claimant.' "

It was appropriate to have plaintiff's liability to Woodcrest for the ORI charges determined in this case. It was just as appropriate to have ORI's liability for the same charges to Schwartz and Woodcrest determined.

Finally, Goldberg claims that ORI rendered services under the authority of the letter to Travelers dated November 19, 1968, "on a cost or charge basis" (34), and that Travelers unilaterally and without just cause rescinded that authority (35). The claim is unadulterated nonsense. The very letter upon which Goldberg relies appears at A-183 and states the following:

(a) the cost of services and facilities and supplies furnished to a related provider "are includible in the allowable cost of the provider at the cost to the related organization";

(b) An exception to the cost of the related organization rule is provided if it is demonstrated

(1) the supplying organization is bona fide;

(2) a substantial part of the business of the type carried on with the provider is carried on with third parties;

(3) there is an open, competitive market for the type of services furnished;

(4) the services rendered are those which commonly are obtainable from third parties by institutions such as the provider; and

(5) the charge to the provider is in line with the charge for such services in the open market and no more than the charge made by the organization (ORI) to others for such services.

None of the bases for making any kind of allowance was available in the absence of ORI's records, which Goldberg refused to provide.

The District Court found as a fact that Goldberg failed to cooperate under the arbitration award, and that finding was based upon his refusal to produce ORI's records (A-172).

The Intermediary Panel found that there was "no sound auditable way to make the cost determination because the necessary records were not made available to the Intermediary (by Goldberg)" (A-16).

The Court of Appeals affirmed the finding that

> "Apparently there was no dispute in the district court as to the fact that Goldberg did not fully cooperate—even after remand by the court for reconsideration—in the hearing panel's review of

Woodcrest's claims regarding its ORI Payments. At every stage, the hearing officials stated that ORI had withheld needed information, with the result that its costs—the maximum rate of reimbursement normally allowed under 42 C.F.R. §405. 427(a)—could not be determined. In the circumstances, we find no error (A-37, 38)."

Conclusion.

There having been no attempt made by petitioner to demonstrate that this case falls within any of the enunciated guidelines for this Court to entertain a writ of certiorari, the case having limited significance and affecting only the particular parties and the arguments offered by petitioner having no supportable foundation, the petition should be denied.

Dated: New York, New York
August 1, 1983

Respectfully submitted,

CHARLES HAYDON
Attorney for Respondents
67 Wall Street
New York, NY 10005
(212) 943-0880